No. 73-1106

# In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

*Petitioners,*

vs.

PAUL T. WIGODA, ET AL.,

*Respondents.*

# APPENDICES

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# APPENDICES

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## APPENDIX A.

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Lawrence O'BRIEN et al., Petitioners,

v.

Willie BROWN et al.
Thomas E. KEANE et al., Petitioners,

v.

NATIONAL DEMOCRATIC PARTY et al.

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Application Nos. A-23 and A-24
(In re Case Nos. 72-34 and 72-35)
[At July 7 Special Term, 1972].
Decided July 7, 1972.

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PER CURIAM.

Yesterday, July 6, 1972, the petitioners filed petitions for writs of certiorari to review judgments of the United States Court of Appeals for the District of Columbia Circuit in actions challenging the recommendations of the Credentials Committee of the 1972 Democratic National Convention regarding the seating of certain delegates to the convention that will meet three days hence.

In No. 72-35, the Credentials Committee recommended unseating 59 uncommitted delegates from Illinois on the

ground, among others, that they had been elected in violation of the "slatemaking" guideline adopted by the Democratic party in 1971. A complaint challenging the Credentials Committee action was dismissed by the District Court. The Court of Appeals on review rejected the contentions of the unseated delegates that the action of the Committee violated their rights under the Constitution of the United States.

In No. 72-34, the Credentials Committee recommended unseating 151 of 271 delegates from California committed by California law to Senator George McGovern under that State's "winner-take-all" primary system. The Committee concluded that the winner-take-all system violated the mandate of the 1968 Democratic National Convention calling for reform in the party delegate selection process, even though such primaries had not been explicitly prohibited by the rules adopted by the party in 1971 to implement that mandate. A complaint challenging the Credentials Committee action was dismissed by the District Court. On review the Court of Appeals concluded that the action of the Credentials Committee in this case violated the Constitution of the United States.

Accompanying the petitions for certiorari were applications to stay the judgments of the Court of Appeals pending disposition of the petitions.

The petitions for certiorari present novel questions of importance to the immediate litigants and to the political system under which national political parties nominate candidates for office and vote on their policies and programs. The particular actions of the Credentials Committee on which the Court of Appeals has ruled are recommenda-



tions that have yet to be submitted to the National Convention of the Democratic Party. Absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee.

This Court is now asked to review these novel and important questions and to resolve them within the remaining days prior to the opening sessions of the convention now scheduled to be convened Monday, July 10, 1972.

The Court concludes it cannot in this limited time give to these issues the consideration warranted for final decision on the merits; we therefore take no action on the petitions for certiorari at this time.

The applications to stay the judgments of the Court of Appeals call for a weighing of three basic factors: (a) whether irreparable injury may occur absent a stay; (b) the probability that the Court of Appeals was in error in holding that the merits of these controversies were appropriate for decision by federal courts; and (c) the public interests that may be affected by the operation of the judgments of the Court of Appeals.

Absent a stay, the mandate of the Court of Appeals denies to the Democratic National Convention its traditional power to pass on the credentials of the California delegates in question. The grant of a stay, on the other hand, will not foreclose the Convention's giving the respective litigants in both cases the relief they sought in federal courts.

We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the

internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates.[1] No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy and essentially political in nature. Cf. Luther v. Borden, 7 How. 1, 12 L.Ed. 581 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (CA8 1968), affirming, 287 F.Supp. 794 (D.C. Minn. 1968), and cases cited; Lynch v. Torquato, 343 F.2d 370 (CA3 1965); Smith v. State Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 (N.D.Ga. 1968). Cf. Ray v. Blair, 343 U.S. 214, 72 S.Ct. 654, 96 L.Ed. 894 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this

[1] This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single State. Cf. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).



unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed.

We recognize that a stay of the Court of Appeals judgments may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee. But, for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions. If this system is to be altered by federal courts in the exercise of their extraordinary equity powers, it should not be done under the circumstances and time pressures surrounding the actions brought in the District Court, and the expedited review in the Court of Appeals and in this Court.[2]

[2] Argument was had and the case decided in the District Court on July 3, the Court of Appeals entered its judgment July 5. Papers were filed here July 6.

The applications for stays of the judgments of the Court of Appeals are granted.

Applications Granted.

Mr. Justice BRENNAN is of the view that in the limited time available the Court cannot give these difficult and important questions consideration adequate to their proper resolution. He therefore concurs in the grant of the stays pending action by the Court on the petitions for certiorari.

Mr. Justice WHITE would deny the applications for stays.

Mr. Justice DOUGLAS, dissenting.

I would deny the stays and deny the petitions for certiorari. The grant of the stays is, in all respects, an abuse of the power to grant one. A stay presupposes an ultimate decision on the merits. But the petitions for certiorari will not be voted on until October, at which time everyone knows the cases will be moot. So the action granting the stays is an oblique and covert way of deciding the merits. If the merits are to be decided, the cases should be put down for argument. As Mr. Justice MARSHALL has shown, the questions are by no means frivolous. The lateness of the hour before the Convention and the apparently appropriate action by the Court of Appeals on the issues combine to make a denial of the stay and a denial of the petitions the only responsible action we should take without oral argument.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS joins, dissenting.

These two separate actions challenge the exclusion from the Democratic national convention by the party's credentials committee of 151 delegates from the State of California and 59 delegates from the State of Illinois, all of whom were selected as delegates as a result of primary elections in their respective States. The excluded delegates allege, in essence, that the refusal of the party to accept them as delegates denies them due process, and denies the voters who elected them their right to full participation in the electoral process as guaranteed by the United States Constitution.[1]

Two assertions are central to the challenge made by the delegates from California. First, they contend that under California's winner-take-all primary election law, which the Democratic party explicitly approved prior to the 1972 primary election,[2] and which the California voters relied on in casting their ballots, they are validly elected delegates committed to the presidential candidacy of Senator George McGovern. Second, they claim that after all of the presidential candidates who were on the ballot in California had planned and carried out their campaigns relying on the validity of the State's election laws, and after all votes had been cast in the expectation that the winner of the primary would command the entire California delegation, the credentials committee changed the party's rules and

[1] While the delegates couch their arguments in various ways, all of the arguments boil down to these two: *i.e.*, they have been denied due process and the voters who elected them have been denied an opportunity to vote for the candidate or delegate of their choice.

[2] This approval was given in the form of a written communication from the Commission on Party Structure and Delegate Selection to the Democratic National Committeeman from California.

reneged on the party's earlier approval of the California electoral system. The delegates contend that, in so doing, the committee and the party impaired the rights of both voters and duly elected delegates in violation of the Fourteenth Amendment.[3]

The Illinois delegates contend that they were excluded on the ground that they were "selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in [certain districts], to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate."[4] They argue that the restrictions placed by the rules on party officials violate their rights under the First and Fourteenth Amendments. It is also suggested that another reason why the delegates were excluded was that their delegation had an insufficient number of Negroes, women, and representatives of certain other identifiable classes of persons. This is alleged to be establishment of a "quota" system in violation of the Fourteenth Amendment.[5]

The United States District Court for the District of Columbia denied both sets of plaintiffs relief on the ground

[3] A hearing officer found merit in the delegates' claims, but he was reversed by the credentials committee.

[4] Report of Hearing Officer, at 2, adopted by Credentials Committee, June 30, 1972.

[5] Report of Hearing Officer, at 3-4.



that there was no justiciable question before it.[6] The United States Court of Appeals reversed the District Court and held that the questions presented in both suits were justiciable. It unanimously rejected the challenge made by the Illinois delegates, and by a 2-1 vote upheld the claim of the delegates from California that the belated change in the rules constituted a denial of due process of law.

The losing parties in the Court of Appeals seek review, and today, this Court grants partial relief in the form of a stay of the judgment of the Court of Appeals. The Court holds, in effect, that even if the District Court was incorrect in ruling that the issues before it were "political questions" not properly justiciable in a court of law, the posture and timing of these cases require that federal courts defer to the Democratic national convention for resolution of the underlying disputes. I cannot agree.

In each of these cases, the claim is made that the Credentials Committee has impaired the right of Democratic voters to have their votes counted in a Presidential primary election. The related claim is also made that the Committee has deprived the delegates themselves of their right to participate in the convention, by methods which deny them due process of law. Both these claims are entitled to judicial resolution, and now is the most appropriate time for them to be heard.

[6] The District Court Judge indicated that, in his view, a quota system would raise serious constitutional questions. Two judges of the Court of Appeals found that the rules did not require any quotas. Judge MacKinnon disagreed, believed that the rules did establish a quota, and that they were, therefore, unconstitutional.

If these cases present justiciable controversies, then we are faced with a decision as to the most appropriate time to resolve them. There would appear to be three available choices: now; after the credentials committee's report is either accepted or rejected by the national convention; or after the convention is over.

There can be no doubt, in my view, that there is, at the present time, a live controversy between the excluded delegates and the Democratic National Committee. Nevertheless, because this controversy may vanish at the national convention, it is suggested that judicial intervention is premature at this point. This may be correct with respect to a decision on whether to grant injunctive relief, but not with respect to the appropriateness of a declaratory judgment.

Should this Court, or a lower federal court, be compelled to wait until the national convention makes a final decision on whether it will seat the delegates excluded by the credentials committee, it may never again be practicable to consider the important constitutional issues presented. Once the convention rules, we will be faced with the Hobson's choice between refusing to hear the federal questions at all, or hearing them and possibly stopping the Democratic convention in midstream. This would be a far more serious intrusion into the democratic process than any we are asked to make at this time.

If we wait even longer—until the national convention is over—and ultimately sustain the delegates' claims on the merits, we would have no choice but to declare the convention null and void and to require that it be repeated. The dispute in these cases concerns the right *to participate* in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot. The drastic remedy that delay might require should be avoided at all costs.



It is, therefore, obvious to me that now is the time for us to act. It is significant in this regard that the delegates request declaratory, as well as injunctive, relief. A declaratory judgment is a milder remedy than an injunction, cf. Perez v. Ledesma, 401 U.S. 82, 111, 91 S.Ct. 674, 690, 27 L.Ed.2d 701 (Brennan, J., concurring in part and dissenting in part). It is a particularly appropriate remedy under these circumstances, because it can protect any constitutional rights that may be threatened at the same time that the premature issuance of an injunction is avoided. Hence, I believe that we should consider the prayer for declaratory relief and that we should do so now.

In granting the stay, then, the Court seems to rely at least in part on the view that the claims are not yet ripe for decision, a view which I cannot accept for the reasons stated above. In addition, the Court suggests that judicial relief will be inappropriate even after the full Convention has ruled on these claims. The point appears to be that, quite apart from the mere matter of timing, the case presents a "political question," or is otherwise nonjusticiable, because it concerns the internal decision-making of a political party. That argument misconceives the nature and the purpose of the doctrine. Half a century ago, Justice Holmes, writing for a unanimous Court, made it clear that a question is not "political" in the jurisdictional sense,

merely because it involves the operations of a political party:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since Ashby v. White, 2 Ld.Raym. 938, 3 Ld.Raym. 320, and has been recognized by this Court. Wiley v. Sinkler, 179 U.S. 58, 64, 65, 21 S.Ct. 17, 45 L.Ed. 84; Giles v. Harris, 189 U.S. 475, 485, 23 S.Ct. 639, 47 L.Ed. 909. See also Judicial Code, § 24(11), (12), (14); Act of March 3, 1911, c. 231; 36 Stat. 1087, 1092 (Comp.St. § 991). If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." Nixon v. Herndon, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927).

The doctrine of "political questions" was fashioned to deal with a very different problem, which has nothing to do with this case. As the Court said in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961), the basic characteristic of a political question is that its resolution would lead a court into conflict with one or more of the coordinate branches of government; courts do decline to decide political questions out of deference to the separation of powers. 369 U.S., at 217, 82 S.Ct., at 710; see Powell v. McCormack, 395 U.S. 486, 518-549, 89 S.Ct. 1944, 1962, 1979, 23 L.Ed.2d 491 (1969). Neither the executive nor the legislative branch of government purports to have



jurisdiction over the claims asserted in these cases. Apart from the judicial forum, only one other forum has been suggested—the full convention of the National Democratic Party—and that is most assuredly not a coordinate branch of government to which the federal courts owe deference within the meaning of the separation of powers or the political question doctrine.

Moreover, it cannot be said that "judicially manageable standards" are lacking for the determinations required by these cases, 369 U.S., at 217, 82 S.Ct., at 710. The Illinois challenge requires the court to determine whether certain rules adopted by the National Party for the selection of delegates violate the First and Fourteenth Amendment rights of Illinois voters and, if the rules are valid, whether they were correctly applied to the facts of the case. The California challenge requires the court to determine whether the votes of party members were counted in accordance with the rules announced prior to the election and, if not, whether a change in the rules after the election violates the constitutional rights of the voters or the candidates. Both these determinations are well within the range of questions regularly presented to courts for decision, and capable of judicial resolution.

A second threshold objection, however, has been raised as an obstacle to judicial determination of these claims. Even if the actions of a political party are not inherently nonjusticiable, it is suggested that the Constitution places few, if any, restrictions on the actions of a political party, and none of those restrictions are even arguably implicated by any of the allegations here. On this view. then, the

plaintiffs below failed to state a claim on which relief can be granted. I disagree.

1. First, I agree with the Court of Appeals that the action of the Party in these cases was governmental action, and therefore subject to the requirements of due process. The primary election was, by state law, the first step in a process designed to select a Democratic candidate for President; the State will include electors pledged to that candidate on the ballots in the general election. The State is intertwined in the process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election, see United States v. Classic, 313 U.S. 299, 61 S.Ct., 1031, 85 L.Ed. 1368 (1941), quoted at p. 2726, *infra*, and the rules that regulate the primary must be held to the standards of elementary due process.

It is suggested that California, at least, cannot be charged with responsibility for the rules that are challenged here, because California by law sought (albeit unsuccessfully) to prohibit the party from adopting those rules. That argument is somewhat disingenuous, however, unless it can seriously be contended that California will decline to recognize on its ballot in the general election the nominee of the Democratic convention. For so long as the State recognizes and adopts the fruits of the primary as it was actually conducted, then the State has made that primary an integral part of the election process, and infused the primary with state action, no matter how vociferously it may protest. A State cannot render the action of officials "private" and strip it of its character as state



action, merely by disapproving that action. Monroe v. Pape, 365 U.S. 167, 172—187, 81 S.Ct., 473, 476—484, 5 L.Ed.2d 492 (1961).

Thus, when the Party deprived the candidates of their status as delegates, it was obliged to do so in a manner consistent with the demands of due process. Because the Court does not reach the question, I likewise refrain from expressing my views on the merits of the due process challenge in either case. It is sufficient to say that beyond all doubt, these claimants are entitled to a judicial resolution of their claim.

2. Even if the action of the credentials committee did not deny the delegates due process, plaintiffs in these cases claim that it impaired the federally protected right of voters to vote, and to have their votes counted, in the presidential primary election.[7]

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[7] The alleged impairment of that right may be regarded as state action, as above, and hence subject to challenge under 42 U.S.C. § 1983. Alternatively, it may be regarded as the action of the Federal Government, on the theory that Congress has the ultimate authority over presidential elections, and has acquiesced in the administration of the primary election process by the national political parties; in that case it may be subject to challenge on the theory of an implied remedy for a federal deprivation of constitutional rights, see Bivens v. Six Unknown Named Agents etc., 403 U.S. 388, 91 S.Ct. 1999. 29 L.Ed.2d 619 (1971). Finally, it may be regarded as private action which interferes with a federally protected right; in that case the existence of a right of action may depend on the question whether the claims can be brought within the terms of 42 U.S.C. § 1985(3), which protects certain federal rights against certain kinds of private interference, see Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

It is of course well established that the Constitution protects the right to vote in federal or state elections without impairment on the basis of race or color, Const.Amend. XV, or on the basis of any other invidious classification, e. g., Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1961); Dunn v. Blumstein, 404 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). With respect to federal elections, however, the right to vote enjoys a broader constitutional protection. In Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1971), Mr. Justice Black cited a long line of precedent for the proposition that Congress has ultimate supervisory power over all congressional elections, based on Art. I, § 4 of the Constitution. E. g., Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717 (1880); Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915); United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). On the basis of these precedents, it is beyond dispute that the right to vote in congressional election is a federally secured right.

Mr. Justice Black went on to argue that presidential elections have the same constitutional status: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U.S., at 124, 91 S.Ct., at 264. To support this conclusion, he relied on Art. II, § 1, and its judicial interpretation in Burroughs v. United States, 290 U.S. 534, 54 S.Ct. 287, 78 L.Ed. 484 (1933), and also on "the very concept of a supreme national government with national officers." 400 U.S., at 124 n. 7, 91 S.Ct., at 264. On the basis of Oregon v. Mitchell, then, in which Mr.



Justice Black's analysis was decisive, the right to vote in national elections, both congressional and presidential, is secured by the Federal Constitution.

Moreover, federal protection of the right to vote in federal elections extends not only to the general election, but to the primary election as well. In United States v. Classic, 313 U.S. 299, 308, 61 S.Ct. 1031, 1034, 85 L.Ed. 1368 (1940), this Court sustained an indictment charging a conspiracy "to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and Laws of the United States, namely, (1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice, and (2) the right of the candidates to run for the office of Congressman and to have the votes in favor of their nomination counted as cast." 313 U.S., at 308, 61 S.Ct., at 1034. It was critical to the decision to hold first that the Constitution protects the right to vote in federal congressional elections, and second that the right to vote in the general election includes the right to vote in the primary.

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right, protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S., at 318, 61 S.Ct., at 1039.

That reasoning has equal force in the case of a presidential election. Where the primary is by law made an integral part of the election machinery, then the right to vote at that primary is protected just as is the right to vote at the election. In the cases before this Court, it is claimed that the presidential primary is an integral part of the election machinery, and that the right to vote in the presidential primary has been impaired. That claim should be heard and decided on its merits, certainly not by the use of the stay mechanism in lieu of granting certiorari and plenary consideration.

It is unfortunate that cases like these must be decided quickly or not at all, but sometimes that cannot be avoided. Where there are no substantial facts in dispute, and where the allegation is made that a right as fundamental as the right to participate in the process leading to the election of the President of the United States is threatened, I believe that our duty lies in making decisions, not avoiding them.

I would therefore deny the Stay.



## APPENDIX B.

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PAUL T. WIGODA, et al., Plaintiffs-Appellees,

v.

WILLIAM COUSINS, et al., Defendants-Appellants.

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Appeal from Circuit Court, Cook County.
Honorable Daniel A. Covelli, Presiding

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MR. JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from an order entered in the Circuit Court of Cook County on July 8, 1972, enjoining and restraining the defendants herein from participating as delegates representing certain Congressional Districts in the State of Illinois at the 1972 Democratic National Convention which was convened in Miami, Florida, on July 10, 1972. Defendants also appeal from another order entered in the Circuit Court of Cook County on August 2, 1972, enjoining and restraining them from participating in a caucus of the Illinois delegation to the Democratic National Convention in order to elect the Illinois representatives to the Democratic National Committee.

The issues presented for review are: (1) whether the trial judge's assertion of jurisdiction over this matter contradicted the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and the opinion of

the U. S. Supreme Court, if they were binding and res judicata as to the issues in this case; (2) whether the trial court's action violated fundamental constitutional rights of free political association of the defendants and the National Democratic Party; (3) whether courts of equity have jurisdiction over political controversies; and (4) whether the trial judge's public comments in this action display a gross bias against the defendants.

Pursuant to those provisions of the Illinois Election Code dealing with the making of nominations by political parties (Ill. Rev. Stat., Ch. 46, § 7-1 et seq.), a primary election was held in the State of Illinois on March 21, 1972. At this primary election, delegates and alternate delegates to the National Nominating Convention of both the Democratic and Republican parties were elected from each of the 24 Congressional Districts in the State of Illinois.

The plaintiffs herein are a class of 59 individuals, including Blacks, Latin Americans, women and persons between 18 and 30 years of age, who were elected in the March 21, 1972, primary election as uncommitted delegates to the National Democratic Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts. Initially, it is worthy of mention that all the plaintiffs in this appeal were required by the Election Code to file on or before January 14, 1972, nominating petitions signed by at least one-half of one per cent of the qualified primary electors of the Democratic Party residing in their respective Districts, in order to have their names placed on the March 21, 1972, primary election ballot. No challenges to the plaintiffs' petitions were raised, and the primary election was held on March 21, 1972, resulting in the election of the plaintiffs by a majority of the qualified electors of the Democratic Party in their respective Congressional Districts. Thereafter, these results were canvassed, certified and reported in accordance with the respective provisions of the Election Code, culminating on April 18, 1972, in the proclamation of the Secretary of State that the plaintiffs herein were the elected delegates to the Democratic National Convention from their respective Congressional Districts.

The defendants herein were initially 10 individuals who filed a formal challenge of the credentials of the plaintiffs with the Acting Chairman of the Credentials Committee of the Democratic National Party on March 31, 1972. In their challenge the defendants allege the plaintiffs were not entitled to credentials for the Convention as they were in violation of certain guidelines which had been previously set forth in the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee, which were thereafter incorporated into Article III, Part J, of the Call of the 1972 Democratic National Convention. Specifically, the defendants alleged in their challenge that the plaintiffs were first chosen as candidates and thereafter elected to be delegates and alternate delegates based on slate-making procedures which were neither open to the public nor had rules attached thereto to attract public participation. The defendants further alleged in their challenge that the plaintiffs were chosen to the exclusion of certain minorities, namely,

Blacks, Latin Americans, women, and persons between 18 and 30 years of age.

In view of the aforementioned challenge filed by the initial 10 defendants, the plaintiffs filed a lawsuit in the Circuit Court of Cook County on April 19, 1972, the first day following the Secretary of State's proclamation naming the plaintiffs as the duly elected delegates to the Democratic National Convention and also, by operation of law, the first day which the plaintiffs could so act in their elective office. In this lawsuit, the plaintiffs sought to enjoin and restrain the defendants who had filed the challenge with the Acting Chairman of the Credentials Committee of the Democratic National Party. A motion for a preliminary injunction was set for April 21, 1972, before Judge Donald J. O'Brien. The hearing on this motion, however, was not held on April 21, 1972, because the defendants filed a petition in the U. S. District Court for the Northern District of Illinois removing the cause to that court on April 20, 1972. There the cause was then assigned to Federal Judge Hubert Will. Thereafter, on April 24, 1972, the plaintiffs filed a motion with Judge Will to remand the cause to the Circuit Court of Cook County on the ground that the initial removal to the U. S. District Court was improper as there was no federal question involved. Judge Will took the motion to remand under advisement and on May 18, 1972, he issued an opinion finding no basis for federal jurisdiction. Judge Will, however, also entered a 10-day stay of his findings in order to enable the defendants to appeal therefrom. Subsequently the U. S. Court of Appeals for the 7th Circuit denied any further stays of Judge Will's finding and



on June 30, 1972, dismissed the defendants' appeal on the ground that there was no basis for allowing the defendants' initial removal from the Circuit Court of Cook County to the U. S. District Court for the Northern District of Illinois.

During the period between April 24, 1972, when the instant plaintiffs filed their motion to remand the original cause to the Circuit Court of Cook County, and May 18, 1972, when Judge Will entered his opinion finding no federal jurisdiction, the defendants herein commenced yet another action in the U. S. District Court for the Northern District of Illinois. In that suit the defendants herein sought to enjoin the plaintiffs herein from any further prosecution of this action in the Circuit Court of Cook County as being violative of their First Amendment rights. That cause was assigned to Federal Judge Frank McGarr, who granted the instant defendants herein a series of non-reviewable temporary restraining orders which prevented any further action in the Circuit Court of Cook County, although such further action was contrary to Judge Will's findings wherein the cause was remanded to the Circuit Court of Cook County because there was no federal question, and the Federal Court therefore lacked jurisdiction. Finally, on June 9, 1972, Judge McGarr held a trial. At the conclusion of the trial a preliminary injunction was issued barring the defendants, who are the plaintiffs in the Circuit Court of Cook County, from proceeding with this action in the Circuit Court. The injunction issued by Judge McGarr was promptly appealed to the U. S. Court of Appeals for the 7th Circuit, where a hearing was held on June 29, 1972. Following oral argument, the court,

acting from the bench, reversed the injunction granted by Judge McGarr and ordered that its mandate issue forthwith so as not to delay any action in the Circuit Court of Cook County. *Cousins* v. *Wigoda,* 463 F.2d 603.

In an attempt to stay this mandate from the U. S. Court of Appeals for the 7th Circuit, the instant defendants petitioned Justice William Rehnquist of the U. S. Supreme Court on July 1, 1972, for a stay order. Following the hearing, Mr. Justice Rehnquist denied the instant defendants' application for a stay, thus clearing the way for a continuation of this action in the Circuit Court of Cook County. At this point it is necessary to mention certain other situations which were transpiring during the course of the previously discussed litigation so as to cast full and proper perspective on the continuation of the instant litigation in the Circuit Court of Cook County from which this appeal arose. These other situations were the activities of the Credentials Committee of the Democratic National Party, and certain litigation which originated in the U. S. District Court for the District of Columbia.

As previously mentioned, on March 31, 1972, the original 10 defendants to this action filed a "Notice of Intent to Challenge" with the Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention. In this "Notice" they stated their intent to challenge the seating of the 59 uncommitted delegates who are the plaintiffs in this action. Thereafter, these original 10 defendants filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegates to the 1972 Democratic National Convention from the Districts Encompassing the City of Chicago." On May 26, 1972,



almost two months after the "Statement" was filed, Cecil F. Poole, a San Francisco attorney, was appointed as hearing officer by the Acting Chairman of the Credentials Committee to conduct hearings on the challenge previously filed by the instant defendants. These hearings were conducted in Chicago on May 31, June 1, and June 8, 1972, with the result being the submission of the document entitled "Findings and Reports of Cecil F. Poole, Hearing Officer to the Credentials Committee" on June 25, 1972. In his report Mr. Poole concluded the plaintiffs herein were elected in violation of certain guidelines set forth in the Call of the 1972 Democratic National Convention.

On June 30, 1972, the Credentials Committee of the 1972 Democratic National Convention, having before it the report of the hearing officer, voted to sustain the findings in the report. Moreover, the Credentials Committee recommended an "alternative" delegation chosen in private caucuses held in Chicago on June 22 and June 24, 1972, be seated to the exclusion of the duly elected delegates. The "alternative" delegation was comprised of the original 10 challengers, who were the original 10 defendants herein, and 49 other individuals, many of whom were defeated candidates for election as delegates in the March 21, 1972, primary. All 59 members of this "alternative" delegation were thereafter joined as defendants in the instant action.

Subsequently, on July 10, 1972, the question of whether to seat the duly elected Illinois delegates or to accept the recommendation of the Credentials Committee and seat the "alternative" delegation was presented to the 1972

Democratic National Convention for a vote. The Convention voted to accept the recommendation of the Credentials Committee and seat the "alternative" delegation to the exclusion of the duly elected Illinois delegation.

In mid-June, 1972, since the hearing officer appointed by the Acting Chairman of the Credentials Committee continually refused to consider questions of law concerning the legality of the Democratic Party Rules and Guidelines, a member of the plaintiff class, Thomas E. Keane, commenced a lawsuit against the Democratic National Party in the U. S. District Court for the District of Columbia to determine whether the guidelines upon which the plaintiff class had been challenged were constitutional. Although the original 10 defendants to the instant action were not made a party to this lawsuit, they sought to intervene and the District Court granted them leave to so intervene. Following a hearing, the District Court held three of the four guidelines upon which the challenge had been raised to be unconstitutional. On immediate appeal to the U. S. Court of Appeals for the District of Columbia, this determination by the District Court was held to be premature because no action had yet been taken by the Credentials Committee on the challenge.

As previously mentioned, the Credentials Committee did render a decision on June 30, 1972, to recommend exclusion of the plaintiff delegates. In light of this action by the Credentials Committee, the District Court for the District of Columbia on July 3, 1972, once again held a hearing and found three of the four guidelines upon which the challenge had been raised to be unconstitutional.



On July 4, 1972, an appeal was again taken to the U. S. Court of Appeals for the District of Columbia. The Court of Appeals on July 5, 1972, affirmed the District Court as to the constitutionality of the one guideline which had been found constitutional and issued an injunction to prevent the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County. The Court of Appeals did, however, stay its mandate for 24 hours to enable the plaintiffs to apply to the U. S. Supreme Court for a further stay. The plaintiffs applied for such a stay and also on July 6, 1972, filed a Petition for Writ of Certiorari. Following a Special Session, the U. S. Supreme Court on the evening of July 7, 1972, granted a stay of the judgment of the Court of Appeals which had enjoined the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County. The Supreme Court also took the Petition for Writ of Certiorari under advisement. *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed ..... U.S. .....; 34 L. Ed.2d 1.

Thereafter, following the Convention, the Supreme Court granted the Petition for Writ of Certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals for the District of Columbia to determine whether the case was moot. *Keane* v. *The National Democratic Party,* judgment vacated ..... U.S. .....; 34 L. Ed.2d 73, October 10, 1972.

On February 16, 1973, the Court of Appeals for the District of Columbia held the case as remanded by the Supreme Court moot and affirmed the judgment of the District Court for the District of Columbia.

Since the U. S. Supreme Court had stayed the judgment of the Court of Appeals for the District of Columbia which had enjoined the plaintiffs from proceeding with the instant action in the Circuit Court of Cook County on the evening of July 7, 1972, the plaintiffs served notice on the original 10 defendants as well as those who had been joined subsequent to their election as members of the "alternative" delegation that a hearing on the original complaint would be held before Judge O'Brien in the Circuit Court of Cook County on July 8, 1972. At the hearing on July 8, 1972, the defendants moved for a change of venue from Judge O'Brien, and the case thereafter was assigned to Judge Daniel A. Covelli. Following a hearing, Judge Covelli entered certain findings of fact from the evidence which had been presented to him. Based upon these findings, Judge Covelli ordered the 59 defendants (each of whom had formally been represented by counsel who was present for the hearing and each of whom had thereby submitted himself to the jurisdiction of the Circuit Court of Cook County) enjoined and restrained from acting or purporting to act as a delegate to the 1972 Democratic National Convention from the particular Congressional Districts involved, or from performing the functions of such delegates in the National Democratic Convention or in its committees.

Rather than seeking an appeal from this injunction, the record reflects the defendants on July 10, 1972, were seated as delegates to the 1972 Democratic National Convention representing the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts in the State of Illinois and thereafter participated as such.



Following the Convention the plaintiffs filed a motion for supplemental relief in the Circuit Court of Cook County. In this motion the plaintiffs sought to enjoin the defendants from participating in a party caucus of delegates to be held on August 5, 1972, for the purpose of selecting the Illinois representatives to the Democratic National Committee. On August 2, 1972, Judge Covelli held an evidentiary hearing in which all parties participated. At this hearing the procedure in which the defendants had been selected as the "alternative" delegation was introduced, as well as the fact that the defendants had violated the July 8, 1972, injunction by participating in the 1972 Democratic National Convention as delegates. Once again, following the hearing, Judge Covelli entered certain findings of fact in which he found the plaintiffs to be the only duly elected delegates. Thereafter the judge ordered a supplemental injunction be entered which reflected his findings of fact that the plaintiffs were the only persons entitled to participate as delegates in the August 5, 1972, party caucus of delegates, and he also restrained the defendants from performing any functions as delegates at such caucus. This appeal was thereafter taken from the orders of the trial court entered on July 8 and August 2, 1972.

The first issue presented for review is whether the trial court's assertion of jurisdiction over this matter contradicted the judgment of the U. S. Court of Appeals for the District of Columbia Circuit and the opinion of the U. S. Supreme Court, and whether they were binding and res judicata as to the issues in this case.

The defendants contend the trial court lacked jurisdiction to consider this cause. The basis for this contention by the defendants lies in their interpretation of the effect of the judgment by the U. S. Court of Appeals for the District of Columbia Circuit entered on July 5, 1972, wherein the Court of Appeals enjoined the plaintiffs from proceeding with this cause in the Circuit Court of Cook County. *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563. The defendants acknowledge such judgment was stayed by the U. S. Supreme Court on the evening of July 7, 1972. However, they attempt to limit the nature of the stay entered by the Supreme Court by asserting that nothing in the opinion of the Supreme Court suggests any intention whatsoever of permitting the plaintiffs to proceed with this cause in the Circuit Court of Cook County. Rather, the defendants contend the judgment of the Supreme Court staying the injunction of the Court of Appeals was intended solely to permit a determination of the issues to be made by the Democratic National Convention "free from judicial intervention." *Keane* v. *The National Democratic Party,* (1972) 469 F.2d 563, judgment stayed ..... U.S. ....., 34 L. Ed.2d 1. The opinion does not say "free from judicial intervention," but says "absent judicial intervention, the Convention could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee." The court was discussing the Federal Courts and does not mention State laws, election of delegates or their rights, or the jurisdiction of State Courts over their delegates. It must be recognized that the Circuit Court of Illinois was not intervening in the Convention, but only exercised its jurisdiction over the



Illinois delegates and challengers under the Illinois Election Code.

The defendants further contend the Supreme Court's stay of the judgment of the Court of Appeals does not operate in any way to alter the binding and res judicata effect of that judgment, and thereby permit a collateral attack of that judgment in an Illinois court, specifically the Circuit Court of Cook County. The defendants would have this court accept their interpretation that the execution of the judgment of the Court of Appeals has been suspended by the Supreme Court's action, thereby barring any assertion of jurisdiction over this matter by an Illinois court.

At the outset, this court is requested to take judicial notice that the judgment of the U. S. Court of Appeals for the District of Columbia Circuit, upon which the defendants base their contention, was subsequently vacated by the U. S. Supreme Court and remanded to the Court of Appeals for further determination. *Keane* v. *The National Democratic Party,* 469 F.2d 563, judgment stayed ..... U.S. ....., 34 L. Ed.2d 1, judgment vacated U.S. ....., 34 L. Ed.2d 73. Considering first the stay order, we hold it completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed. Then came the Supreme Court order vacating the Court of Appeals order, thereby rendering said order non-existent and a nullity, as if it never existed. It was stricken from the records and of no force or effect. Certainly such a vacated order could not be res judicata of anything. In addition there are other reasons why it is not res judicata.

On February 16, 1973, the Court of Appeals determined the issues before it were moot and joined in the finding previously entered by the District Court for the District of Columbia, wherein the defendants were denied the injunctive relief which they sought. *Keane* v. *The National Democratic Party,* U.S.C.A. for the District of Columbia Circuit, Docket No. 72-1629 (1973).

For a court to apply the doctrine of res judicata or the broader doctrine of estoppel by judgment, there are certain prerequisites which must be present. To be res judicata there must not only be an identity of the parties involved but there must also, and most importantly, be an identity of the issues. For the doctrine of estoppel by judgment to lie there must minimally be an identity of issues.

Viewing the issues and parties involved herein as compared with the issues and parties in the case upon which the defendants rely, namely, *Keane* v. *The National Democratic Party,* we find a near total lack of identity as to either issues or parties. The issue which is central to the instant cause is the Illinois Election Code (Ill. Rev. Stat., 1971, Ch. 46, § 7-1, et seq.), and the right of the plaintiffs who were elected pursuant to its provisions to serve in their elective office. The issue which was central to the litigation which ensued in *Keane* v. *The National Democratic Party* was the constitutionality of the guidelines of the National Democratic Party, upon which the Credentials Committee for the 1972 Democratic National Convention had determined the plaintiffs herein were not in compliance. In fact, the trial court in *Keane* v. *The National Democratic Party* stated:



"No violation of Illinois law is at issue here."

Likewise, the parties in the two causes differ. The plaintiff in both causes is that same class composed of those individuals elected to be delegates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts in the State of Illinois. The defendants, however, are quite different. The defendants herein are the 59 members of the "alternative" delegation, including the original 10 individuals who initiated the challenge of the plaintiffs' right to sit as delegates filed with the Credentials Committee on March 31, 1972. The defendant in *Keane* v. *The Democratic National Party* was the National Democratic Party, although the original 10 challengers sought and were granted leave by the U. S. District Court for the District of Columbia to intervene in that case.

Another reason is most clear for this court to refuse to entertain the defendants' contention, namely, the defendants' failure to preserve their argument, based on the res judicata effect of the decision of the U. S. Court of Appeals for the District of Columbia Circuit, in the record. The Illinois Supreme Court in *Svalina* v. *Saravana,* (1930) 341 Ill. 236, stated that for an estoppel defense to act as a bar to further litigation, it must be both pleaded and proven. A thorough review of the record as related to both the July 8, 1972, and August 2, 1972, trial court proceedings reflects that the defendants neither formally pleaded nor attempted to prove their claim of res judicata based on the decision of the Court of Appeals for the District of Columbia Circuit. The record reflects the defendants entered no pleadings other than a motion to

dismiss, which was filed on July 5, 1972, and upon which they chose to stand. In that motion to dismiss, defendants refer to the litigation in the District Court for the District of Columbia. However, they make no mention of the decision of the Court of Appeals upon which they rely for their res judicata contention. This is another reason why this court refuses to entertain the defendants' contention concerning the res judicata claim of the decision of the Court of Appeals for the District of Columbia.

This court is also asked to take judicial notice of the decision of the Court of Appeals for the 7th Circuit in the case of *Cousins* v. *Wigoda,* (1972) 463 F.2d 603, initiated by the original 10 challengers, defendants herein, against that class of persons who are plaintiffs herein in the U. S. District Court for the Northern District of Illinois. In that decision the Court of Appeals for the 7th Circuit makes it most clear where they believe jurisdiction over the instant matter should be assumed when they state:

> "There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not . . . disputed those allegations. . . . Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues. . . . Plaintiffs have not alleged or attempted to prove they will not receive a fair trial in the courts of Illinois, or that the state judicial system will not fully honor and protect their constitutional rights."

Immediately thereafter the challengers sought a stay of the Court of Appeals order from the Supreme Court of



the United States. In denying the stay, Mr. Justice Rehnquist said (409 U.S. 1201, 34 L. Ed.2d 15):

> "The opinion issued by the Court of Appeals majority specifically alluded to petitioners' [the challengers'] failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to petitioners for this purpose."

The second issue presented for review is whether the trial court's action violated the fundamental constitutional rights of free political association of the defendants in the National Democratic Party.

The defendants contend their right to freedom of political activity and association as assured them under the First Amendment of the U. S. Constitution was patently abrogated by the trial court's judgment enjoining them from acting or purporting to act as delegates to the 1972 Democratic National Convention from the particular Congressional Districts involved herein. The defendants base this contention on their assertion: that the National Democratic Party formulated and adopted certain guidelines for organizing their Party; that the plaintiffs, following the filing of a challenge by 10 of the defendants and the holding of a formal hearing pursuant thereto, were found by the hearing officer to be in violation of certain of those guidelines; and, that the Credentials Committee of the 1972 Democratic National Convention adopted the findings of the hearing officer that the plaintiffs were in violation of certain of the guidelines and voted that the defendants should be seated as an "alternative" delegation in place of the plaintiffs. Based on these assertions, the defendants

conclude any attempt to prevent them from participating as delegates representing the challenged Congressional Districts would therefore violate their right, and the right of the National Democratic Party, to freedom of political activity and association as assured them under the First Amendment.

In claiming their fundamental rights have been abrogated, the defendants fail to consider certain rights of plaintiffs which have been abrogated not only by defendants' actions but also by the actions of certain representatives of the Credentials Committee of the 1972 Democratic National Convention. Initially, it is necessary for this court to state that although the purposes and guidelines for reform adopted by the Democratic National Party in its Call for the 1972 Democratic National Convention were issued, they in no way take precedence in the State of Illinois over the Illinois Election Code (Ill. Rev. Stat., 1971, Ch. 46, § 7-1, et seq.). The opening section of Article 7 of the Election Code, which deals with the making of nominations by political parties (§ 7-1), is most clear when in discussing the selection of delegates to National nominating conventions, it states:

> "§ 7-1. . . . [D]elegates and alternate delegates to National nominating conventions by all political parties, as defined in Section 7-2 of this Article 7, shall be made in the manner provided in this Article 7, and not otherwise."

The record reflects that at no time has the election of the plaintiffs been challenged by the defendants under any of the numerous provisions provided in Article 7 of the Election Code. These provisions were included in the



Election Code to insure the due process rights of the participants in elections and the rights of voters would be preserved at all stages of the elective process. On oral argument, counsel for the defendants admitted the plaintiffs were elected according to the provisions of the Election Code, and the defendants in no way contested such election under the Election Code. However, the defendants still persist in attempting to assert their right to the office of delegates to the 1972 Democratic National Convention from the particular Congressional Districts involved, and still contend that any judgment by the trial court in upholding the election of the plaintiffs by approximately 700,000 voters is an abrogation by that court of their fundamental rights of political association. We disagree with defendants' reasoning. On the one hand the defendants admit the plaintiffs were duly elected to the elective office of delegates to the 1972 Democratic National Convention, and on the other hand they state any judgment by the trial court upholding such election is a violation of their rights. The sole basis for such shallow reasoning appears to be the defendants' reliance on the findings of a hearing officer appointed by the Acting Chairman of the Credentials Committee for the 1972 Democratic National Convention to determine the merits of the defendants' challenge of the plaintiffs' election, and the action by the Credentials Committee in adopting his findings. Having reviewed the findings of the hearing officer, we conclude he erred in his refusal to consider the legal arguments, including the constitutionality of the guidelines, and by disregarding the Illinois law, all of which were raised by the plaintiffs. In view of the fact the defendants rely on a

report which is blatantly violative of the plaintiffs' due process rights on its very face, and the actions of the Credentials Committee subsequent to the receipt of such report, we find it necessary to examine the action of the Convention.

In *United States* v. *Classic,* 313 U.S. 299, at 318, 61 S.Ct. 1031, at 1039, the Supreme Court said:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

The Poole report ignored the State law and the fact the guidelines referred to, which state "When State law controls, the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose," and also provides, "* * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process."

The people voting in the primary elected 59 delegates, including nine male and three female Blacks, and four



Caucasian females, two Latin American females, and five Caucasian persons under 30 years of age, making a total of 23 delegates representing the minority views, yet the Poole report calls this "proof of actual discrimination by itself." Such a conclusion demonstrates deliberate distortion of the facts by the hearing officer.

The right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code. As stated in Section 7-1 of the Code, the election of delegates and alternates ". . . to national nominating conventions . . . shall be made in the manner provided in this Article 7, and not otherwise." Also, see *Cousins* v. *Wigoda,* 463 F.2d 603, 606 (7th Cir. 1972), application for stay denied U.S. , 34 L. Ed. 2d 15, where the court said:

> "Illinois law may control, or may affect, the manner of selecting substitutes or alternates. Indeed the Rules of the National Convention contemplate reference to state law in connection with various issues."

The Rules of the National Convention state:

> "B-6. Adequate representation of minority views on presidential candidates at each stage in the delegate selection process * * * the Commission urges each State Party to adopt procedures which will provide fair representation of minority views on presidential candidates and recommends that the 1972 Convention adopt a rule requiring State Parties to provide for the representation of minority views to the highest level of the nominating process."
>
> "The Commission believes that there are at least two different methods by which a State Party can provide for such representation * * *. Second, it can choose

delegates from fairly apportioned districts no larger than congressional districts.

"C-5. Committee selection process * * * the Commission requires State Parties to limit the National Convention delegation chosen by committee procedures to not more than 10 percent of the total number of delegates and alternates. * * *

"When State law controls, the Commission recommends that State Parties make all feasible efforts to repeal, amend, or otherwise modify such laws to accomplish the stated purpose."

Elections in Illinois are, by the mandate of the Illinois Constitution of 1970 (Art. 4, § 3), "free and equal." The courts have long required that primary elections be free and open to all qualified persons. *Craig* v. *Peterson,* (1968) 39 Ill.2d 191; *People* v. *Deatherage,* (1948) 401 Ill. 25, 37; *People ex rel. Breckon* v. *Board of Election Commissioners,* (1906) 221 Ill. 9.

*Malone* v. *Superior Court in and for the City and County of San Francisco,* 40 Cal.2d 546, 551, 254 P.2d 517 (1953); *State ex rel. Cook* v. *Houser,* 122 Wis. 534, 100 N.W. 964 (1904); *Walling* v. *Lansdon,* 15 Ida. 282, 300-303 (1908); *Walker* v. *Grice,* 159 S.E. 914, 917-918 (S. Car., 1931); *Kinney* v. *House,* 10 So.2d 167, 168 (Ala., 1942); *Bentman* v. *7th Ward Democratic Executive Committee,* 421 Pa. 188, 199-203 (1966); *O'Brien* v. *Fuller,* 93 N.H. 221, 228, 39 A. 2d 220 (1944); *Lasseigne* v. *Martin,* 202 So.2d 250, 255 (La. Ct. of Appeals, 1967); *Shelly* v. *Brewer,* 68 So.2d 573 (Fla. 1953); *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So. 144, 146 (1920); *D'Alemberte* v. *State ex rel. Mays,* 56 Fla. 162, 47 So. 489, 499 (1908); *Application of McSweeney,* 61 Misc.2d 869, 307 N.Y.S.2d 88 (1970); *Currie* v. *Wall.* 211



S.W.2d 964, 967 (Tex. Civ. App., 1948); *Carter* v. *Tomlinson,* 220 S.W.2d 351 (Tex. Civ. App., 1949); *Morris* v. *Peters,* 46 S.E.2d 729, 738 (Ga., 1948); *State ex rel. Kennedy* v. *Martin,* 24 Mont. 403, 62 P. 588 (1900).

The right of an elected delegate to assume office is important not only to him, but to the electors of the party. In *State ex rel. Merrill* v. *Gerow,* 79 Fla. 804, 85 So. 144, the Florida Supreme Court stated:

"The rights acquired and the duties imposed by the primary election laws are valuable and important not only to those who acquire them under the law, but to the entire people of the State. Upon the manner in which these powers and duties are performed, depends to an appreciable degree, the welfare of the State. . . . . The rights acquired under a primary elections law are, therefore, of the same nature as those acquired under the general election laws, and to deprive a person of the rights acquired by the former is the equivalent of depriving him of his right to hold the office." (80 So. at 146).

The primacy of state law over the decisions of a national political party convention was detailed in an early decision of the Wisconsin Supreme Court in *State ex rel. Cook* v. *Houser,* 122 Wis. 534, 100 N.W. 964 (1904). There, a dispute arose between two groups of Republican party officials, each claiming that it had held a regular and proper state convention to choose candidates for the general elections and delegates to the party's national convention. Wisconsin statutes provided for the creation of a party tribunal to make determinations and advise the Secretary of State in such disputes. The officially designated tribunal decided for one group, the national convention for the

other. The court held that the determination of the national convention could not control the decision by the state tribunal authorized by statute. The court stated:

> "We do not find anything in any of such cases remotely, even, sustaining the proposition that the decision of the national convention of a party is superior to the decision of a state tribunal of the same party, where the latter tribunal is made the sole judge by legislative enactment, or otherwise.
> " • • •
> "In view of the foregoing, since the law of this state has provided the conditions under which the party nominees shall go upon the official ballot, how can it be reasonably said that the decision of the national convention of a party can nullify it? The answer seems so plain as not to warrant this extensive treatment of the matter. Nothing but the great importance of the case could be held to justify it. The moment the conventions performed their work of choosing candidates, the rights of such candidates to have their names placed upon the official ballot became irrevocable privileges, subject only to the legislative condition. That such condition could be displaced by any mere party authority, either within or without the state, dignifying it as paramount to the sovereign will of the people, and so binding its courts and its special tribunal created to decide the matter, does not seem to us to have support in reason or authority." (122 Wis. at 586, 589.)

Because election to the office of convention delegate in Illinois is governed by non-discriminatory state legislation, the instant case is not merely an intraparty factional dispute to be settled by party discipline. In this case, the law of the state is supreme and party rules to the con-



trary are of no effect. In *Malone* v. *Superior Court in and for the City and County of San Francisco*, 40 Cal.2d 546, 254 P.2d 517 (1953), the court stated:

> "The prospective witnesses contend, however, that courts will not interfere with affairs of political parties or committees and hence applicant could have no cause of action. (18 Am. Jur., Election, §§ 143, 144.) 'Where, however, statutes conferring legal rights on members of a political party have been passed, the courts have the right to ascertain whether those rights have been violated and the decision of a party tribunal on such question is of no binding effect. Moreover, if primary elections have been established by law, a candidate cannot be divested by a political organization of rights derived from such election, the question being no longer solely a political one, but one of law of which the courts must take cognizance. The same is true with respect to the rights of members of a party committee elected at a primary election conducted under public authority.' (18 Am. Jur. supra, Elections, § 143.) Certainly, where civil and property rights rather than politics and political dogma are involved, the court will protect them." (40 Cal.2d at 551.)

Courts are reluctant to intervene in intraparty disputes only where the right in question is not governed by statute. When, however, the subject matter is controlled by legislation, particularly the laws which provide for primary election to party office, the courts do not hesitate to assume jurisdiction. *Lasseigne* v. *Martin*, 202 So.2d 250, 255 (La. Ct. of App., 1967); 25 Am. Jur.2d, Elections, § 126, p. 811. Here the delegates were elected by a majority of the qualified Democratic electors in their respective districts. As such, under Illinois law, they are the legal representa-

tives of the party and of the people at the Convention. As stated by the Supreme Court of this state in *People* v. *Sweitzer*, (1918) 282 Ill. 171:

> "They are elected at a direct primary election of their respective political parties in which each member of the party is entitled to exercise his choice, and they are made the legal representative of their respctive parties. They are elected as the general representatives of the members of the party, and collectively they constitute the county convention for nominating candidates and may exercise all the powers of the political party in that regard." (282 Ill. 176.)

Once the delegates were chosen in a free, open and nondiscriminatory primary election, it became the legal duty of the party to carry out the mandate of the electorate. Once elected, any question of the delegates' qualifications to hold office is beyond the authority of party functionaries; it is a legal right properly protected by the courts. *Allen* v. *Republican State Central Committee*, 57 So.2d 248, 251 (La. App., 1952).

A free and open election process is the cornerstone of our government. The right of a citizen to vote is a fundamental political right, preservative of all rights. *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Dunn* v. *Blumstein*, 405 U. S. 330, 31 L. Ed.2d 274 (1972); *Evans* v. *Cornman*, 398 U. S. 419, 422 (1970); *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968). The courts have consistently and jealously protected that right against denial, *Smith* v. *Allwright*, 321 U.S. 649 (1944), dilution, *Gray* v. *Sanders*, 372 U.S. 368 (1963), or even discouragement, *Williams* v. *Rhodes*, 393 U.S. 23 (1968). As stated by the Supreme Court in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966):



> "Long ago in *Yick Wo* v. *Hopkins*, 118 U.S. 356 . . ., the Court referred to 'the political franchise of voting' as a 'fundamental political right because preservative of all rights.' Recently in *Reynolds* v. *Sims*, 377 U.S. 533 . . ., we said 'Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' " (383 U.S. at 667.)

State and federal courts have gone to great lengths to open up the primary election process and to maximize the rights of citizens to participate therein. *Dunn* v. *Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274 (1972) and cases cited therein; *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir., 1947), cert. denied, 333 U.S. 875 (1948); *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9, 18-19 (1906); *People ex rel. Coffey* v. *Democratic General Committee*, 164 N.Y. 335, 341-42, 58 N.E. 124 (1900); *Bentman* v. *7th Ward Democratic Executive Committee*, 421 Pa. 188, 200-202 (1966); *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144, 145-147 (1920); *Carter* v. *Tomlinson*, 220 S.W. 351, 355 (Tex. Civ. App., 1949).

The interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect. See *State ex rel. Merrill* v. *Gerow*, 79 Fla. 804, 85 So. 144 (1920); *Malone* v. *Superior Court in and for the City and County of San Francisco*, 40 Cal.2d 546, 254 P.2d 517 (1953);

*People ex rel. Coffey* v. *Democratic General Committee,* 164 N.Y. 335, 341 (1900); *Bentman* v. *7th Ward Democratic Executive Committee,* 421 Pa. 188, 198 (1966).

The legislature of the State of Illinois has established election machinery to guarantee the broadest possible citizen and candidate participation in the nomination process by providing for election of delegates to the national conventions. The defendants cannot be permitted to frustrate the state's interest in maximizing that participation. Party rules are not a law unto themselves. *Smith* v. *Allwright,* 321 U.S. 649, 663 (1944). As stated in *People ex rel. Coffey* v. *Democratic General Committee*:

> "The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect, whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct it from the top downward." (164 N.Y. at 341-342.)

The Illinois Supreme Court has demonstrated that it will enforce the right of Illinois citizens to maximum participation in the process by which candidates are nominated for a public office. In *People ex rel. Breckon* v. *Board of Election Commissioners,* (1906) 221 Ill. 9, relator filed a petition for a writ of mandamus to direct the defendant Board



of Election Commissioners to allow the Socialist Party to hold a primary election. The court stated:

> "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law. It is undoubtedly true, as urged by counsel for defendants, that it has become not only proper, but necessary, to provide additional safeguards and protection to the voters at primary elections, to the end that their will may be fully expressed and faithfully and honestly carried out, and any law having that object in view would naturally commend itself to the law-making power. The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of the voters, and not to curtail or subvert them or injuriously restrict such rights." (221 Ill. at 18-19.)

The National Convention is an integral part of the process by which the President and Vice President of the United States are elected. The citizens of the state have an obvious interest in preserving the validity of their votes for delegates to the convention. *Gray* v. *Sanders,* 372 U. S. 368, 380 (1962); *Newberry* v. *United States,* 256 U. S. 232, 285, 286 (1921); *Georgia* v. *National Democratic Party,* 447 F.2d 1271 (D.C. Cir., 1971). In *Newberry* v. *United States,* Mr. Justice Pitney stated:

"[I]t seems to me too clear for discussion that primary elections and nominating conventions are . . . closely related to the final election . . . . So strong with the great majority of voters are party associations, so potent to the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations. . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." (256 U.S. at 285-286.)

Defendants' challenge rests on the premise they and various party functionaries are a force superior to the will of the voting majority and the votes cast for the delegates are somehow less significant than any other votes. This premise is diametrically opposed to the Illinois Constitutional guaranty of "free and equal" elections which holds that each vote is equal in its influence on the result as any other vote. *Craig* v. *Peterson*, 39 Ill.2d 191, 233 N.E.2d 345 (1968); *Moran* v. *Bowley*, 347 Ill. 148, 162-163, 179 N. E. 526 (1932). As early as 1886, the Illinois Supreme Court stated in *People ex rel. Grinnell* v. *Hoffman*, 116 Ill. 587 (1886):

"Elections are free, where the voters are subjected to no intimidation or improper influence, and where every voter is allowed to cast his ballot as his own judgment and conscience dictate. Elections are equal, when the vote of every elector is equal, in its influence upon the result, to the vote of every other elector,—when each ballot is as effective as every other ballot." (116 Ill. at 599.)



The right to effective candidacy for public and party office is an obvious corollary to the right to vote. *Hadnott* v. *Amos*, 394 U. S. 358, 364 (1969); *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Gonzales* v. *City of Sinton*, 319 F. Supp. 189, 190 (S. D. Tex., 1970); *Stapleton* v. *City of Inkster*, 311 F. Supp. 1187, 1189-1190 (E. D. Mich., 1970); see also "Constitutional Safeguards in the Selection of Delegates to National Nominating Conventions," 78 Yale L. J. 1228, 1247-1249 (1970). As stated by the District Court in *Gonzales*:

"It is equally certain that, to be guaranteed the full extent of the rights acknowledged by these franchise cases, plaintiffs must be granted the concomitant right to stand for office. A resident's vote for the candidate of his choice may have little meaning if no candidate speaks for the interests of that voter . . . ." (319 F.Supp. at 190.)

The right of the challenged delegates to stand for office is a right protected by the equal protection clause, *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), and by due process, *Williams* v. *Rhodes*, 393 U. S. 23, 41 (1968), (Harlan, concurring); *Briscoe* v. *Kusper*, 435 F.2d 1046, 1053-1054 (7th Cir., 1970).

We think the Convention, a voluntary association, was without power or authority to deny the elected delegates their seats in the Convention and most certainly could not seat people of their choice and force them upon the people of Illinois as their representatives, contrary to their elective mandate. Such action is an absolute destruction of the democratic process of this nation and cannot be tolerated. Since the plaintiffs were admittedly elected to the position of delegates to the 1972 Democratic National Con-

vention by operation of the Election Code, an Illinois statute, this court finds the trial court's injunctions did not abrogate defendants' fundamental constitutional rights of free political association. Rather, we find the due process and equal protection rights of the plaintiffs and approximately 700,000 voters have been abrogated by the actions of the defendants.

The third issue presented for review is whether the courts of equity have jurisdiction over political controversies.

The defendants contend the action of the trial court in granting both the July 8, 1972, and August 2, 1972, injunctions was patently contrary to established Illinois law that courts of equity have no jurisdiction over political controversies. In presenting this contention for consideration, the defendants rely heavily on the decision of the Illinois Supreme Court in *People* v. *McWeeney,* (1913) 259 Ill. 161, a case in which both an injunction, issued to bar certain individuals from interfering with a city political meeting, and contempt proceedings, held subsequent to the violation of the injunction, were overturned by the Supreme Court.

This court finds no merit in defendants' contention that the trial court's action violated an established principle of Illinois law. The defendants' reliance on the decision in *People* v. *McWeeney* is not well taken since *People* v. *McWeeney*, in which no statute was in issue, most clearly states:

> "The general rule is well established that the judicial department of the government has no right to interfere with or attempt to control a citizen in the exercise of



> political rights unless the jurisdiction is expressly given by statute or by clear implication."

The people of this state have a right to rely on a statute and the courts have a duty to follow the terms of a statute.

The plaintiffs, as the defendants have admitted, were elected according to the provisions of the Election Code and were duly certified according to the provisions of the Election Code to be the delegates to the 1972 Democratic National Convention from their respective Congressional Districts. This court, therefore, finds both the statute and the requisite "clear implication" called for by the Supreme Court in *People* v. *McWeeney* present for a court of equity to take jurisdiction over this controversy.

The final issue presented for review is whether the trial judge's public comments on this action display a gross bias against the defendants.

The defendants contend that certain comments attributed to the trial judge display such bias against the defendants as to call the courts of this state into disrepute. The defendants further contend these comments demonstrate the defendants did not receive a fair hearing as guaranteed by the due process and equal protection clauses of both the U. S. Constitution and the Constitution of the State of Illinois. The basis for defendants' contention is certain newspaper articles in which statements attributed to the trial judge reflect what the defendants contend to be gross bias against them on his part.

The record reflects the trial judge, having received the instant cause on July 8, 1972, subsequent to a change of

venue taken by the defendants from another Circuit Court judge, held a hearing in which both plaintiffs and defendants participated. At the conclusion of the hearing the trial judge issued the first of two injunctions barring the defendants from acting or purporting to act as delegates to the 1972 Democratic National Convention. At no time prior to or during the course of the hearing on July 8, 1972, did the defendants present a motion for change of venue from the trial judge. Such motion was made by the defendants on July 20, 1972, nearly two weeks later. At that time the trial judge responded to the defendants' counsel regarding the comments attributed to him in those newspaper articles published subsequent to July 8, 1972, and thereafter denied the motion for change of venue to Lake County. The Illinois Venue Act (Ill. Rev. Stat., Ch. 146, § 8) clearly states:

> "§ 8. Neither party shall have more than one change of venue."

In view of this statutory section, and since the defendants' motion for a second change of venue was not made until 12 days after a hearing on the merits from which an injunction had issued, this court finds no merit in the defendants' contention that the public comments attributed to the trial judge in newspaper articles subsequent to their original hearing precluded them from receiving a fair hearing.

For the reasons stated herein, the orders of the Circuit Court of Cook County are affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.



## APPENDIX C.

### FINDINGS AND REPORT
### of
### CECIL F. POOLE

Hearing Officer
Submitted to the Credentials Committee of the
1972 Democratic National Convention.
June 25, 1972

• • • • •

On May 26, 1972, the Honorable Patricia Roberts Harris, Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention, appointed the undersigned to act as Hearing Officer in the challenges filed against 59 of the Delegates and all 31 of the Alternate Delegates elected at the March 21, 1972 Primary in the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Congressional Districts of the State of Illinois.

Hearings were conducted in Chicago on May 31 and June 1, and again on June 8, 1972.

Both sides were represented by counsel and in person. Evidence, both oral and documentary was received, and the proceedings were reported by certified Court Reporters and their transcripts approximating 2,000 pages have been received and read. More than 500 exhibits, including affidavits and other documents, were introduced.

The Hearing Officer has weighed and considered all the evidence together with the inferences therefrom and does hereby first make the next-following Summary of Findings and then his Report to the Committee, as follows:

SUMMARY OF FINDINGS:

The Hearing Officer FINDS:

I. *Guideline A-5*

That the procedures by which the challenged delegates and alternates were selected in the Illinois Primary on March 21, 1972, violated in substantial respects the provisions of *Guideline A-5* in that the Democratic Party of Illinois did not at the time of the election have in effect explicit written rules, available and readily accessible, covering the delegate selection process, so drafted and publicized as to facilitate maximum participation among interested Democrats, and providing full information as to dates, times and places of meetings involved in the process.

That as a result, persons not already of the party organization, not familiar with or privy to the channels of intra-party communication and the usages of party power and structure, had little opportunity to participate, to be heard, or even to be aware of the times and steps at and by which critical decisions and selections came into being.

That the challenged slate of delegates was selected outside the arena of public participation by, and given the massive support and endorsement of, the Democratic organization in Chicago and specifically and clearly identifiable as the party apparatus in Congressional Districts 1, 2, 3, 5, 7, 8, 9 and 11, to the exclusion of other candidates not favored by the organization, and this without written and publicized rules and with no notice to the public such as would permit interested Democratic electors to participate.



That the absence of plausible explanation as to the actual mechanism by which the prevailing slate of candidates was in fact assembled, contrasted with the evidence, abundant and probative, that their names then appeared upon sample ballots and slates without internal dissent among the 40 Ward and Township Committeemen and other party regulars making up the list, and thereafter supported, distributed and urged by party workers and officials, leads to the ineluctable conclusion that these were foreordained results of the violation of the requirements of openness and public involvement.

II. *Guideline C-4*

Guideline C-4, "Premature Delegation Selection (timeliness)", forbids Democratic Party echelons from practices by which officials elected or appointed before the calendar year of the convention either choose or endorse a slate of delegates. This rule was violated in letter and spirit in that there was a clear concert of act and deed among officials of the regular party organization in Chicago (none of them elected in the 1972 calendar year or for slate-making purposes), to accomplish the private selection of delegates; thereafter, to put the full weight, authority, prestige and support of the organization behind the candidacies of those thus chosen; and to discourage or to render ineffective parallel efforts by those outside the protective penumbra of the party's influence.

III. *Guideline C-6*

That the violations set forth as to Guidelines covering openness and timeliness involved for the same reasons a violation of C-6, slate-making, and that the violations of C-4 and C-6 were deliberate, covert and calculated.

As a result of the above, the Hearing Officer further FINDS:

IV. *Guidelines A-1 and A-2*

That the combination of the violation of the rules relating to procedure, notice, openness, timeliness and slate-making resulted in the election on March 21, 1972 of 59 of the organization's 62 slated delegates and of all 31 of its offered alternates; and that this produced a proposed delegation in which ethnic and racial minorities—Blacks and Latin Americans and women and young people under 30, were grossly underrepresented in disregard of the clear purpose of Guidelines A-1 and A-2.

In reaching this conclusion, the Hearing Officer has rejected the suggestion that the convention will, or that the rules should be interpreted to, impose—as the challengers seem to imply—upon the Democratic Party a commitment to a quota based upon or approximating group proportions in the general population. Any such principle would be encumbered by grave doubt in any case, but its application here is unnecessary because the underrepresentation found was so extreme as to indicate (with a high degree of conviction) that the Party has failed in its basic obligation to open up to fuller participation by those who have historically been excluded, as intended by the Guidelines and the Call to the 1972 Convention.

It is true that the Guidelines for Hearings, Rule 7(a), provides that upon a showing of underrepresentation, the burden is shifted to the challenged to show that "appropriate" action was taken to achieve the "proper" representation. The Hearing Officer interprets this rule simply as a



procedural device requiring the party to come forward and demonstrate affirmatively its bona fides in opening the heretofore closed portals and in inviting the outsiders in, and views it in the light of all the other circumstances and human motivations which bear upon the invitation and its disposition.

The challenged in this case have not sufficiently gone forward with the burden of that issue.

*Analysis of the Challenges*

1. The Challengers, ten in number, residents of Illinois and members of the Democratic Party, contest the seating at the 1972 Democratic National Convention of 59 persons seeking to be seated as "uncommitted" delegates and 31 persons seeking to be seated as "uncommitted" alternates, as the successful candidates from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts, lying in whole or in part within the City of Chicago, Cook County, Illinois, all of whom were elected at a primary held March 31, 1972. The names of the challenged parties and of the challengers appear in the record.

2. The 59 challenged delegates represented include all but three of the successful candidates at the primary election in the above eight districts. The three additional elected delegates and three additional elected alternates, not under challenge, were committed to the candidacy of Senator Edmund Muskie.

The challenge is based upon the allegation of violations of Guidelines A-1, A-2, C-1, C-4 and C-6 of the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee as they have been

incorporated into Article III, Part I, of the Call of the 1972 Democratic National Convention.

The challenge claims violations of the guidelines in two major respects:

1. Minorities (including Latin Americans and Blacks), women, and persons between 18-30 are grossly underrepresented among the proposed delegates and in all Chicago Democratic Party affairs (A-1 and A-2); and

2. The proposed delegation as to delegates and alternates was slated, endorsed and supported by the Democratic Party organization of Chicago without open slatemaking procedures, without public rules relating thereto, and by Party officials who had themselves been chosen prior to 1972.

*The Guidelines Provisions In Question*

Guideline A-1 refers to the resolution adopted at the 1964 National Convention conditioning the seating of delegates at future conventions on the assurance of non-discrimination in any State Party on account of race, color, creed or national origin. In describing the adoption by the 1968 Convention of that 1964 Resolution and the inclusion of the same in the Call of the 1972 Convention, the guideline refers also to the adoption by the Democratic Convention in January 1968 of six anti-discrimination standards ("the Six Basic Elements") for parties to meet. All of the above was designed to insure full opportunity for all minority groups to participate in the delegate selection process to supplement which the Commission requires that:



1. State Parties add the Six Basic Elements to their party rules and take appropriate steps to secure their implementation;

2. State Parties overcome the effects of past discrimination by affirmative steps to encourage minority group participation, including representation of minority groups on the delegation "in reasonable relationship to the group's presence in the population of the state".

A footnote states that this is not to be accomplished by the mandatory imposition of quotas.

Guideline A-2 states that discrimination on the grounds of age or sex is inconsistent with the full and meaningful opportunity to participate in the delegate selection process. The Commission requires State Parties to eliminate such discrimination and to overcome the effects of past discrimination by affirmative steps to encourage representation on the delegation of young people (18-30) and of women in reasonable relation to their presence in the population of the state.

Again, the footnote cited states that this is not to be accomplished by the mandatory imposition of quotas.

Guideline A-5—*Existence of Party Rules*

Requires State Parties to adopt and make available the rules relating to the delegate selection process; to adopt rules which will facilitate maximum participation among interested Democrats in that selection process and specifically providing for dates, times and public places of meetings.

The Commission also requires State Parties to adopt rules which will facilitate maximum participation among interested Democrats in the selection process.

Guideline C-1—*Adequate Public Notice*

The rule requires state parties to assure voters an opportunity to "participate fully" in party affairs. This includes adequate public notice including the publicizing of time, places and rules for the conduct of all meetings of the party. Parties are also required to circulate concise and public statement in advance of the election itself on the relationship between the party business to be voted upon and the delegate selection process.

Guideline C-4—*Premature Delegate Selection* (Timeliness)

The Call to the 1972 Convention includes the requirement that the delegation selection process must begin within the calendar year of the convention. The guideline provides that the practice by which state chairmen, state, district or county committees select, or chose agents to select, the delegate is inconsistent with the Call; that the rule prohibits any untimely procedures which have any direct bearing on the processes by which National Convention Delegates are selected, and the process by which the delegates are nominated is such a procedure. Therefore, parties are prohibited from practices by which party officials elected or appointed before the calendar year chose nominating committees or propose or endorse a slate of delegates—even when the possibility for a challenge to such slate or committee is provided.



Guideline C-6—*Slate-making*

The process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected and parties are required to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process.

Whenever slates are presented to caucuses, meetings, conventions, committees or to voters in a primary the rule requires that the party have adopted procedures which assure:

1. That the bodies making up the slates have been elected, assembled or appointed for the slate-making task with adequate public notice that they would perform such task;

2. That the persons making up the slate have adopted procedures which facilitate wide-spread participation in that process.

3. That there be safeguards provided to assure that the right to challenge the presented slate is more than perfunctory.

## THE EVIDENCE

### A. *The Party Structure*

The Democratic Party organization in Cook County, Illinois is headed by the County Central Committee consisting of the 50 Chicago Ward Committeemen and 30 Township Committeemen for a total of 80. The chairman, currently

the Mayor of Chicago, is chosen by the committee members and in turn appoints an Executive Committee (RT 825). The nominal parent organization is the Illinois State Central Committee which has 24 members, one for each congressional district, is invested by law with certain general oversight of party affairs in Illinois. The testimony showed that the slating of candidates has historically been carried out as a joint function of the State Central Committee along with a group selected by the Chairman of the Cook County Central Committee. The State Committee was not shown to exert substantial control over the affairs of the County Committee. In Cook County precinct captains in each ward are appointed by the committeeman from that ward. Under them are hundreds of precinct workers who in former days were beholden to the committeeman for jobs and other political emoluments. The precinct captain keeps track of voters and of general precinct affairs. They hold jobs such as clerks, elevator operators, sewer and building inspectors, etc. They are not civil service, and when there is a turnover in a political job-dispensing office, these people lose their jobs. A witness described this as "patronage jobs". (RT 861) Although there was testimony that a recent court decision resulted in an order banning certain types of patronage manipulation, the evidence is clear that the practice still thrives.

Meetings of the Cook County Central Committee are not usually preceded by public notice although some are and the public and press may attend when certain statutory functions are being conducted. Meetings held for the purpose of selecting and endorsing candidates for public office are not open until after the decision has been made, at



which time the endorsed candidates may be brought in and introduced to the persons present (RT 829). The same general procedure has in the past been applicable to the slating of congressmen and delegates to the National Convention. Selection of congressmen has apparently been an harmonious and cooperative procedure. Theoretically the selection is made by the vote of the ward and township committeemen, each casting the number of votes equal to the votes cast in his ward or township in the last preceding election. The testimony was that in fact a consensus is usually arrived at quickly in the case of congressmen (RT 832).

Under the old procedure for the selection of delegates to the National Convention, two were formerly elected from each Congressional District and a larger number selected at large in convention. One witness, involved and experienced in party affairs, testified that the general pattern was for the ward committeemen in the district to rotate with each other from one convention to the other in filling the 48 convention delegates leaving 60 or 70 seats to be appointed by the State Convention; that those selected were typically office holders and party officials (RT 835). There were formerly no written party rules covering the whole process. It was shown that the Democratic Party in Illinois introduced in the legislature in 1971 a number of statutory measures designed to bring the election code of Illinois into conformity with the spirit and the letter of the Commission guidelines. These efforts were effective, (1) in permitting for the first time the candidate for delegate to state his preference or to list himself as uncommitted; (2) in changing the formula by which delegates were ap-

portioned so that each congressional district was apportioned based on its population and the vote cast by it in the preceding presidential election; and (3) finally to move into the current year of the convention the deadline for filing candidacies for delegate. In addition to that, the Democratic Party of Illinois finally adopted written rules which became effective in April 1972 but not effective at the election which is here under contest.

B. *The Chicago Party Organization and the Selection of Candidates in Chicago*

In former times selection of candidates for delegate and alternate was accomplished by the party organization through slating procedures now forbidden by the guidelines. There was testimony and substantial evidence and the hearing officer finds that the 59 challenged delegates were selected by procedures which in major part still reflected the forbidden slating method and in major part too was arrived at out of public view but with the unmistakable indicia of clear understanding and mutual cooperation among all the echelons of Cook County organization from the Chairman down through the Ward Committeeman.

There was testimony that at a meeting prior to the election, the Chairman, adverting to the guidelines, stated in a committee meeting that the delegates would be elected as they always had been (RT 847); that he "didn't give a damn" about the [McGovern] rules (RT 1016).

There was testimony that a candidate for delegate had expressed a desire to list a preference for president and requested permission from the Chairman to run committed



to that candidate, but was told by the Chairman that the organization had to "stay together on this" (RT 858).

A Chicago Alderman, himself a challenged delegate testified for the challengers (requiring therefore, in the Hearing Officer's judgment, careful scrutiny of motive and bias but eventually given probative value). He stated positively that a closed meeting of the Party members in Chicago was convened on February 24, 1972 following a meeting of the County Central Committee; that there was discussion by the Chairman about the need for making it clear just who were the organization-supported candidates; and insisting that the organization had the right "to express its views on the selection of delegates" (RT 1013-1018).

The same witness testified that in December 1971 he had been invited to attend a luncheon of organization members at which delegates to the convention from the 9th Congressional District were to be discussed (RT 1067). The witness declined the invitation and a counter-affidavit (Exhibit 18-10) by Scott Hodes (from whom the invitation issued) describes the luncheon as simply a "Christmas Party Luncheon get-together" for the Democratic Committeemen at which no discussion concerning delegates took place.

In an affidavit (Exhibit 7-5) Alderman William Singer related a conversation held on January 8, 1972 with Mr. John Merlo (44th Ward Regular Democratic Committeeman) about candidates for the 9th Congressional District. According to the affiant, Merlo told him that the "Regular Organization" was going to slate Messrs. Huppert, Hartigan, Wigoda, Tuchow, Hodes, Lerner and Ms. Hedlund. The affidavit continues:

"* * * When I indicated that that was only seven and there were eight candidates to be elected, Mr. Merlo turned to Judge Kenneth Wendt and said, 'Who's that other candidate that Danny O'Brien [44th Ward Alderman Daniel P. O'Brien] put up for delegate?' Mr. Merlo then answered his own question by saying, 'I think he's a young kid named Paul Stepan, but I don't know him'. Mr. Merlo then also indicated that Steven Yates had been 'put up' for the position of alternate delegate."

Mr. Merlo has filed a counter-affidavit (Exhibit 18-22) confirming that a conversation was held but stating:

"* * * Alderman Singer asked if I knew who the delegates would be and I answered I did not.

"I do remember Judge Wendt saying he hoped that a fine young man like Steve Yates would run, and I replied that if he did, I sure would like to see him win. "No slate of names were mentioned as I had no knowledge of who the delegates would be."

It is the fact that thereafter the names of all those mentioned in Alderman's recital, above, appeared on the sample ballots for the 9th District.

Eventually there emerged slates of delegates in each congressional district supported by the identifiable party organization and structure. The Chairman, Mayor Daley, and 37 of the 50 Chicago Ward Committeemen were on the slate plus 3 of the committeemen who filed for the position of delegate appeared on the sample ballots distributed by the organization. Many of the other slated candidates are identifiable as persons connected with the organization, such as the County Clerk, the Sheriff of Cook County, the President of the Chicago City Council, in-laws or relatives



of committeemen, the son of Chairman Daley, other party officials, party candidates for public office and persons described as "confidantes" of the Chairman or otherwise affiliated with the Democratic organization. In no district did more ward committeemen and other organization officials file than were delegate positions available. In each case, prior to the March 21, 1972 Primary Election, precinct party workers circulated in all the Congressional Districts the sample ballots and slates, by whomsoever ordered, on which candidates supported by the organization were named with an "X" in the boxes opposite their names while all other candidates (i.e., those not supported by the organization) were un-named and identified only as "other candidate".

Abundant evidence in scores of affidavits (see Exhibits 4-1 through 4-46) established that precinct workers throughout the challenged districts distributed these same ballots to residences, offices and on the street, and that they urged the support of the persons listed as the "organization" or "machine" candidates, and generally conveyed the message that the regular party organization in Chicago had and was supporting its own slate of candidates for delegate and supported none other.

Other affidavits (Exhibits 5-1 through 5-48) disclosed a wide-spread pattern of Primary day electioneering by precinct workers who checked to see that voters had brought the sample ballots with them to the polls, and who urged such voters to vote the straight organization supported tickets.

Counter-affidavits—of which Exhibits 14-10 (Congressman George W. Collins), 14-11 (Illinois House of Represen-

tative Isaac Sims) and those of Delegates Neil Hartigan (18-3), Jerome Huppert (18-5), Marilou Hedlund (18-8), are among the many which have been read and considered. They detail each affiant's account of the manner in which she or he came to run for the position of convention delegate and in general show impressive histories of party service and interest. Some of the office-holders invoke the aspect of name-recognition as accounting for their success on March 21; each insisting that his decision to run was arrived at independently without reliance upon any commitment by the regular party organization or party officials. Their reconciliations of the appearance of their respective names on the sample ballots are not as specific as are their denials of concerted action. Mr. Sims did assert in his affidavit that he ordered the printing of sample ballots and that he did so;

> "* * * because he was requested to do so by many of his friends living within the 28th Ward. He further states that he listed seven other delegates on the sample ballot because, in his opinion, a sample ballot with only his own name listed with an 'X' would mislead voters so that only one vote would be cast when each voter had the right to cast ballots for eight individuals running on the official ballot. It was his opinion that if he marked only one 'X' he would in effect, be disenfranchising such persons from seven of their votes. He listed as persons also recommended on the slate, friends of his who were running as uncommitted Delegates because those persons listed on the ballot with a presidential preference did not reflect his personal preference for the nomination of the Democratic candidate for President in 1972."



From the mass of sharply conflicting evidence, there emerges a clear pattern of concerted action by the organization in the use of its influence and prestige in support of its regulars, encouraging their candidacies, agreements on numbers, cooperation in the preparation of sample ballots, their widespread distribution by party workers, their prominence at headquarters of ward officials, and the formidable array of party power in behalf of its preferred candidates.

All of this compels the irrefragable conclusion, and the Hearing Officer finds, that Guidelines C-1, C-4 and C-6 have been violated in the nomination and election of the challenged delegates and alternates in Chicago.

C. *Composition of the Chicago Delegation*

The most immediately remarkable feature of the delegation under challenge is its impressive collection of Ward and Township Committeemen, 40 in number, along with the Secretary of the Cook County Central Committee and headed by the Chairman, Mayor Daley. This appears in Exhibit "A" to this report. Only one of these is a woman—Ward Committeewoman Lillian Piotrowski.

A document entitled "Official Results of Votes Cast in Cook County Primary Election held Tuesday, March 21, 1972" which was issued by the County Clerk of Cook County, was admitted into evidence as Exhibit 2 (b). It sets forth the votes received by each candidate in each of the eight Congressional Districts involved in this challenge, and is attached to this Report as Exhibit "B".

During the testimony of Pierre De Vise (RT 1274-1331), a City Planner and Demographer called on behalf of the

challengers, the exhibit was given symbols to identify, as far as possible, each of the elected Delegates and Alternates as belonging to the groups referred to in Guidelines A-1 and A-2. The symbols used, as seen on this current Exhibit "B" are:

F — Female

B — Black

LA — Latin-American

Y — Young (18 to 30)

These figures are considered against a backdrop of the evidence produced in the testimony of witness De Vise. He introduced 1970 Census figures for Chicago which put the 1970 total population at 3,355,000 of which approximately 33% were Blacks and 9% Latin American. (RT-1275 et seq.). It was the witness's testimony that this represented an undercount of 10% for both ethnic groups; that by March 1972 Blacks constituted 37% of the Chicago population (1,323,000), while Latin Americans constituted 10% (320,000).

He placed the presence of women in the population at 52%, and of those between the ages of 18 and 30 at 30%, although he did not break down the cohort of those in the respective sex-age-ethnicity categories. [To some extent we have refined the breakdown in the charts, infra.]

By Congressional District he estimated the Latin American and Black population totals and percentages as follows:



| District | Black Number | | % | Latin American Percentage Only |
|---|---|---|---|---|
| First | 411,599 | — | 89% | 0% |
| Second | 184,376 | — | 45% | 07% |
| Third | 24,075 | — | 06% | 0% |
| Fifth | 145,254 | — | 34% | 10% |
| Seventh | 255,230 | — | 59% | 19% |
| Eighth | 83,109 | — | 20% | 18% |
| Ninth | 21,287 | — | 04% | 12% |
| Eleventh | 927 | — | 0% | 02% |

Combinations of the symbols have been employed as indicated. The breakdown of the elected delegates pursuant to the symbol is:

*Delegates:*

| District | F | B | LA | Y | FBY | F/LA | F/LA/Y | BY | LA/Y | FY | FB |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1st | | 5 | | | 2 | | | | | | |
| 2nd | | 1 | | 1 | | | | | | | |
| 3rd | | | | | | | | | | | |
| 5th | 1 | 1 | | 2 | | | | | | | 1 |
| 7th | | 2 | | | | | | | | | |
| 8th | | | | 1 | 1 | 1 | 1 | | | | |
| 9th | 3 | | | 1 | | | | | | | |
| 11th | | | | | | | | | | | |
| Totals | 4 | 9 | | 5 | 3 | 1 | 1 | | | | 1 |

*Alternates:*

| District | F | B | LA | Y | FBY | F/LA | F/LA/Y | BY | LA/Y | FY | FB |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1st | | 2 | | | | | | | | | |
| 2nd | | 2 | 2 | | | | | | | | |
| 3rd | 2 | | | | | | | | | | |
| 5th | 1 | 1 | | | | | | | | | |
| 7th | | 1 | | | | 1 | | | | | |
| 8th | 1 | 1 | | | | | | | | | |
| 9th | | | 1 | | | | | | | 1 | |
| 11th | | | | | | | | | | 1 | |
| Totals | 4 | 7 | 3 | | 1 | | | | | 2 | |

The challenged delegation includes nine male and three female Blacks for a total of 12;

four Caucasian females;
two Latin-American females; and
five Caucasian youths under 30.

The inclusion of only nine females out of 59, given the proportion of women (of all ages, color, creed and races) in the general population, is suspicious at best. It would not, however, be proof of actual discrimination by itself. But to this must be added the testimony of the former President of the League of Women Voters, Mrs. Jeannette Stessl (RT 649-710), that in her extensive experience there had been little or no effort made by the organization to really involve women in important and meaningful activities of the party. She further testified that a party worker visited her home prior to the 1972 primary and brought a sample ballot which he urged her to follow. Mrs. Stessl inquired as to why there were so few women listed and whether this activity did not violate the guidelines. The worker, an Assistant States Attorney in Cook County, responded that he did not know what the guidelines were but that anyway, "they'll fix that up in Miami". (RT 664). He also said that women didn't belong in politics.

Whether the above remarks reflect party feelings or were simply the utterances of a political journeyman, it is a fact that the delegation is grossly underrepresented not only as to women but also (with the outstanding exception of the 1st Congressional District and to a lesser extent the 9th) as to Blacks, the young and Latin-American citizens.



In view of the discussion and findings with respect to Part B, above, as to the role of the party structure in the delegate selection process, the Hearing Officer concludes that the selectivity which so heavily favored entrenched office-holders and regulars was also operative in the choosing of women, the young, and racial minorities, and that it discriminated against them invidiously and substantially. This is not because such persons have a legitimate claim to party office and perquisites on a mathematical or proportionate basis. Many other factors combine to affect that result: interest, capacity, loyalty, name-recognition, popularity, and the like. And eventually, by virtue of all these elements, and oftentimes despite them, the ultimate judges—the electors—give their own impeccable verdict in the secrecy of the voting booth.

The Hearing Officer concludes, and finds, that the underrepresentation complained of was not the result of fortune, unaffected by the efforts of the organization, but was a continuation of the same conditions exposed in the Commission Report and came about because, although diligent in including its own regulars, the organization in Chicago expended no such resources on the segments of the population as required by Guidelines A-1 and A-2.

The Hearing Officer accordingly finds that those Guidelines have been violated both in letter and in spirit.

## CONCLUSION

For the reasons hereinabove set forth, the Hearing Officer finds and reports to the Credentials Committee of the 1972 Democratic Convention that in the election of Delegates and Alternate Delegates in the First, Second, Third, Fifth, Seventh, Eighth, Ninth and Eleventh Congressional

Districts of the State of Illinois, Guidelines A-5, C-1, C-4, C-6 were violated and thereafter Guidelines A-1 and A-2 were also violated.

Respectfully submitted, June 25, 1972.

CECIL F. POOLE
Cecil F. Poole, Hearing Officer



## APPENDIX D.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

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No. 72-1628
WILLIE BROWN, ET AL., Appellants
v.
LAWRENCE O'BRIEN, ET AL.

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No. 72-1629
THOMAS E. KEANE, ET AL., Appellants
v.
NATIONAL DEMOCRATIC PARTY, ET AL.

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No. 72-1630
THOMAS E. KEANE
v.
NATIONAL DEMOCRATIC PARTY,
ET AL., Appellants

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No. 72-1631
THOMAS E. KEANE, ET AL.
v.
NATIONAL DEMOCRATIC PARTY, ET AL.
WILLIAM COUSINS, ET AL., Appellants

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On Appellants' Motions for Summary Reversal

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Decided July 5, 1972

Before BAZELON, *Chief Judge,* FAHY, *Senior Circuit Judge,* and MACKINNON, *Circuit Judge.*

*Per Curiam:* These two cases, which have come before us on motions for summary reversal and expedited consideration, call into question the power of the Democratic Party to exclude from its 1972 national convention certain challenged delegates from California and Illinois. In both cases delegates unseated by action of the credentials committee of the national convention assert that they were expelled in violation of rights guaranteed by the Constitution. The district court dismissed the complaints in both cases, upholding the action of the credentials committee. In No. 72-1630 we affirm the district court's judgment dismissing the complaint of Illinois plaintiffs, and, for the reasons set forth below, we remand the case to the district court for entry of an order barring these plaintiffs from taking action in any other court that would impair the effectiveness and the integrity of the judgment of this Court. In No. 72-1628 we reverse the judgment of the district court and remand the case to that court for entry of an order declaring defendants' action null and void, and enjoining defendants from excluding these elected California delegates because of their selection in a winner-take-all primary.

## I.

### The California Challenge

California plaintiffs are 151 persons who ran in a statewide primary election on June 6, 1972, as part of a 271 person slate committed to the presidential candidacy of Sen. George McGovern of South Dakota. Sen. McGovern won the California primary with a plurality of the vote, roughly 43 per cent, and under the winner-take-all provi-



sion of the California primary election law,[1] the entire 271 person slate was designated as the California delegation to the national convention. A challenge was then brought against the California delegation on the grounds that the winner-take-all feature of the California primary law was invalid under rules adopted by the Democratic Party in 1971—the so-called McGovern Commission guidelines. The hearing examiner appointed by the credentials committee rejected the challenge and it was renewed before the full committee on June 29, 1972. At that time the challengers apparently dropped the allegation that winner-take-all was inconsistent with the McGovern guidelines, and maintained that it violated the mandate of the 1968 convention. With California's representatives on the credentials committee not voting, because their delegation was under challenge, the credentials committee passed by a six vote majority the following resolution:

> WHEREAS the 1968 Convention guaranteed to all Democrats, a "full, meaningful and timely opportunity" to participate in the delegate selection procedures of our party, and
>
> WHEREAS the California winner-take-all primary election held on June 6, 1972 denied that opportunity to participate to almost two million Democratic voters, and
>
> WHEREAS the California winner-take-all primary functionally disenfranchised 56% of the California Democratic electorate who did not vote for George McGovern, and
>
> WHEREAS the California winner-take-all primary awarded 100% of the delegate votes of the State

[1] *See* Calif. Elections. Code §§6300-93, and in particular §6386.

of California to the McGovern slate, while awarding no delegates to other candidates who received votes of California Democrats—Humphrey, Muskie, Wallace, Chisholm, Jackson, McCarthy, Lindsay and Yorty,—in spite of the fact that proportional representation is an integral party of the 1968 reform mandate of the Democratic National Convention, and

WHEREAS a majority of the California Democratic electorate will have no representation or voice in the 1972 Democratic National Convention under the proposed California delegation of Senator McGovern, in contradiction to the entire thrust and spirit of Party reform in the Democratic Party over the last four years, now therefore,

BE IT RESOLVED by the Credentials Committee of the 1972 Democratic National Convention, that the California delegation not be seated as presently constituted, that a delegation apportioned on the basis of proportional representation be substituted in its place, that the formula for this representation be directly proportional to the votes cast by the Democratic voters of the State of California in the June 6, 1972 primary, that this voting results in the election of 106 Humphrey delegates, 16 Wallace delegates, 12 Chisholm delegates, 6 Muskie delegates, 4 Yorty delegates, 3 McCarthy delegates, 2 Jackson delegates, 2 Lindsay delegates, and 120 McGovern delegates, and the appropriate number of alternate delegates in all cases, and

BE IT FURTHER RESOLVED that those delegate positions be filled by an open and representative procedure—in the case of 120 McGovern delegates, a caucus of the 271 individuals on the McGovern slates, for all other candidates with the exception of Governor Wallace, a caucus of the



respective California slates, and for the Wallace positions, an open caucus to be held in the State of California, with adequate public notice, not later than July 5, 1972, that all delegates included on the California delegation as reconstituted be selected consistent to the A1 and A2 provisions of the Call for the 1972 Democratic National Convention which calls for reasonable representation of women, youth and minorities, so that the % of these groups, blacks and chicanos does not decrease, and that the names of all members of this newly constituted and equitable California delegation be presented to the Secretary of the Democratic National Committee before July 7, 1972 who will certify such names as the California delegation to the 1972 National Convention.

In their complaint, the excluded California delegates assert that their expulsion was in violation of, inter alia, their constitutional right to due process of law. We have no difficulty concluding that defendants' action against these delegates was state action. See Terry v. Adams, 345 U.S. 461 (1953); Georgia v. National Democratic Party, 447 F. 2d 1271 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 858 (1971). We also conclude, for the reasons described below, that expulsion of these 151 California delegates was inconsistent with fundamental principles of due process.

At the heart of the controversy in these two cases are the guidelines on delegate selection promulgated by the McGovern Commission in April, 1970, and adopted by the Democratic National Committee in February, 1971. One of these guidelines, B-6, deals with the representation of minority views on presidential candidates at each stage of the delegate selection process. That guideline urges

State Parties to adopt procedures which will provide fair representation of minority views. But the guideline explicitly stops short of abolishing the winner-take-all provision. Thus, the examiner who initially heard the challenge to the California delegation made findings as follows:

4. The parties stipulated during the hearing that the McGovern Commission gave full and careful consideration to requiring the abolition of the winner-take-all concept at least at the state level, and decided not to make its abolition mandatory. The other evidence presented at the hearing confirmed this stipulation.

5. The language of Guideline B-6 itself supports the stipulation. In contrast to other Guidelines, it uses the word "urges" instead of the word "requires" with respect to the proceedings specified.

Plaintiffs also submitted an affidavit indicating that at a meeting of the McGovern Commission on November 19, 1969, a Commission member proposed that the guidelines "require" the abolition of winner-take-all provisions for 1972. The proposal was apparently defeated by a vote of 13 to 3. The understanding that winner-take-all was still a viable concept for the 1972 convention was also reflected in *The Call for the 1972 Democratic National Convention.* The Call incorporates the resolution of the Democratic National Committee adopting the McGovern guidelines, and it reiterates the distinction between guidelines which the state parties are "required" to adopt, and those which they are "urged" to adopt.



The hearing examiner also found that the State Democratic Party of California relied on representations made by authoritative spokesmen for the national party. The examiner indicated that:

6. Congressman Donald A. Fraser and Robert Nelson of the Commission on Party Structure and Delegate Selection testified to negotiations with the California Democratic Party on compliance with the Guidelines. With respect to B-6 their testimony was that although California was urged in the early part of the negotiations to take steps to abandon the winner-take-all primary, it was assumed at all times that that was not a requirement for compliance with the Guidelines for the 1972 Convention.

7. The final letter from Congressman Fraser to Mr. Stephen Reinhardt of California, dated April 28, 1971 (Challengers Exhibit G) states (page 2):
   "Although Guideline B-6 'urges' state parties to adopt procedures which provide for fair representation of minority views on presidential candidates, it does not require that the winner-take-all statewide primary be abolished in selecting delegates. Therefore it is permissible to use this system in California in 1972."

8. In a letter dated February 1, 1972, (Respondents Exhibit 5) from Lawrence O'Brien to Mr. Charles T. Manatt, Democratic State Chairman, Mr. O'Brien said that "the Fraser Commission informs me that the California Party is in full compliance with the Guidelines." This was confirmed in a similar letter to Mr. Manatt, dated February 7, 1972, from Robert W. Nelson, Staff Director of the Commission (Respondents Exhibit 6).

9. The evidence establishes that all interested persons and organizations, including the candidates, acted in reliance on the fact that Guideline B-6 did not outlaw the winner-take-all statewide primary as a method of delegate selection in 1972.

Conceding no support for their action in the Call to the Convention or the McGovern guidelines, defendants would justify the expulsion of these plaintiffs solely on the Credentials Committee's construction of the resolution adopted by the 1968 national convention. That resolution, which initiated the process of reform and provided the mandate of the McGovern Commission's action, stated:

> Be it resolved, that the call to the 1972 National Democratic Convention shall contain the following language:
>
> It is understood that a State Democratic Party in selecting and certifying delegates to the National Convention thereby undertakes to assure that such delegates have been selected through a process in which all Democratic voters have had a full and timely opportunity to participate.
>
> In determining whether a state party has complied with this mandate, the Convention shall require that:
>
> (1) The unit rule not be used in any state of the delegate selection process, and
>
> (2) All feasible efforts have been made to assure that delegates are elected through party primary, convention or committee procedures, open to public participation within the calendar year of the National Convention.

Defendants now seek to characterize the action of the credentials committee as reflecting a determination that



"insofar as Guideline B-6 permits the selection of delegates on a winner-take-all basis, in disregard of the views of minorities within the state parties, it is invalid under the mandate of the 1968 Convention and therefore is of no force or effect." Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, July 3, 1972, at 38.

Plaintiffs respond—in our view, with great force—that nothing in the 1968 resolution can reasonably be seen as a prohibition of winner-take-all provisions. They point out that (1) the resolution specifically bars the unit rule, but makes no mention of the winner-take-all concept; (2) the resolution has been consistently interpreted since 1968 as not requiring abolition of winner-take-all, and assurances to that effect were repeatedly offered to the California state party; (3) the 1968 *Report of the Commission on the Democratic Selection of Presidential Nominees* (Hughes Commission), a critical part of the "legislative history" of the 1968 resolution, gives no indication that abolition of winner-take-all was a part of the 1968 reform package. On the contrary, while laying the groundwork for the convention resolution and the McGovern Commission, the report of the Hughes Commission clearly states that:

> [t]he Commission does not, however, flatly condemn the winner-take-all principle in state primaries, since such primaries offer a useful device for engaging popular interest and involvement in the process of selecting a President.

Report at 19.

In resolving this question we begin with a firm conviction that the political parties must have wide latitude in

interpreting their own rules and regulations. And we recognize that this latitude must be especially wide where, as here, a reviewing court is hampered by severe shortage of time which prevents a prolonged inquiry into the meaning of the rules. But on the basis of the record now before us and the argument we have heard, we are compelled to conclude: (1) that the provision of the 1968 resolution invoked to justify the exclusion of these delegates is vague and indeterminate—requiring this action, if at all, only by innuendo; (2) that nothing in the statements made at the time of the adoption of that resolution or in its subsequent interpretation by the Guidelines and party officials suggests that it was ever understood to enact a ban on winner-take-all; (3) that plaintiffs and the State of California acted in justifiable reliance on the continuously reiterated assurances of Democratic Party officials that winner-take-all was not proscribed; and (4) that the Democratic Party did not merely interpret one of its rules—in essence, it acted in defiance of its own rules as interpreted in the Call for the 1972 Convention by establishing retroactively an entirely new and unannounced standard of conduct.

The question remains, therefore, whether the Constitution bars the Democratic Party from changing the rules after the election has been held. We recognize that some consider the change adopted by the Party to be a laudable one and the direction of recent attempts at Democratic Party reform is quite plainly toward the principle of proportional representation and maximum participation of minority views. But the process by which that result is reached is necessarily as important as the result itself.



We cannot be blind to the fundamental deficiencies in the fairness of the process of reaching that result. Nor can we overlook the injuries to which those deficiencies gave rise.

If the party had adopted a ban on winner-take-all prior to the California primary election, the candidates might have campaigned in a different manner, devoting more or less time and resources to the state. Voters might have cast their ballots for a different candidate;[2] and the State of California might have enacted an alternative delegate selection scheme that would comply with party rules and that might be more responsive to its own state interests than the pure proportionality of representation that was imposed by the credentials committee.[3] The interests of the political candidates, the voters of California, and the State of California are plainly substantial, and the injury to these interests might itself require our intervention. But the fundmental basis of our action is the grave injury to the fairness and legitimacy of the process of electing the President of the United States. As a nation we can tolerate, and even welcome, disputes about the merits of

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[2] It has been suggested, for example, that voters who cast ballots for one of the front-runners in the race might have voted for another candidate if they had been aware that delegates would be divided in proportion to votes. Plaintiffs also suggest that certain presidential candidates may have dropped out of the race on the assumption that only the winner would be awarded any delegates.

[3] Thus, the State of California might have enacted a scheme whereby delegates are divided by congressional district, with all of the delegates for each district being awarded to the candidate who obtained the most votes in that district. See guideline B-6.

different rules which might govern the election of the President. It may well be, for example, that direct election of the President is more fair than indirect election by the electoral college, and that distribution of delegates in proportion to votes received by the candidates they represent is more fair than winner-take-all. These are questions about which reasonable men can differ. But there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force. The decision of the Party to exclude these 151 delegates, who were elected in compliance with each of the party's applicable rules then in force, jeopardizes the integrity of the election process, and it therefore injures every voter in the United States and every individual and institution which is subject to the authority of the President. Because we are convinced that the process of electing the President of the United States is not, and cannot be, placed outside the rule of law, we set aside the arbitrary and unconstitutional action of the Democratic Party.[4] The case is remanded to the district court for entry of an order declaring defendants' action against these plaintiffs null and void, and enjoining defendants from unseating these duly qualified and

[4] Plaintiffs argue that their exclusion violated not only their rights to due process of law but also to equal protection of the laws. They assert that delegates from twelve states were selected pursuant to some variant of the winner-take-all principle, and they protest the application of this new rule against only the California delegation. In view of our resolution of the due process contention, we express no opinion on the merits of the equal protection argument.



elected delegates to the national convention because they were selected in a winner-take-all primary election.

## II.

### The Illinois Challenge

The Illinois case involves a challenge to the seating of a group of 59 uncommitted delegates elected pursuant to state law, from various congressional districts in Northern Illinois.

After the Illinois delegate primary was held on March 21, 1972, a challenge was filed to the seating of the delegates in question on the ground that several of the guidelines of the Democratic National Party, promulgated by the McGovern Commission in April, 1970, had been violated. The complaint before the Credentials Committee was based on asserted violations of rules A-1, A-2, C-4 and C-6. These rules deal with the requirements that State Democratic Parties make the delegate selection process an open and fair one.

After a lengthy hearing, the Hearing Examiner selected by the Credentials Committee to hear the complaint issued findings of fact. His decision upheld the challengers' contention with respect to each of the guidelines in question. The Credentials Committee voted to accept the Hearing Examiner's report in total; to unseat the challenged delegates; and to seat an alternative slate of delegates.

This suit was thereafter instituted as a class action in the District Court, on behalf of the 50 challenged delegates and the voters they represent. The complaint sought to overturn the decision of the Credentials Committee on

the grounds that its action violated the constitutional rights of the 50 delegates.[5] The challenged delegates sought a declaration that each of the guidelines, as applied to them, was unconstitutional; and an injunction reinstating them as delegates to the 1972 convention.

After a hearing, the District Court denied the request for an injunction. In so ordering, the court found that the action of the Credentials Committee with respect to guidelines A-5 and C-6 did not pose any deprivation of constitutional rights. In addition, the Court readopted its findings of June 19, which had been vacated by this court on the ground of prematurity. See note 5 *supra*. Those findings held certain of the guidelines unconstitutional.

The Illinois delegation recognizes that in order to prevail, it must sustain its assertion that each of the grounds relied on by the Hearing Examiner, and in turn by the Credentials Committee, is unconstitutional. They have not met that burden. The District Court's determination that there exists a valid basis for the action of the Cre-

[5] The plaintiffs in this case had filed a suit in the District Court, seeking essentially the same relief as sought here, prior to the ruling of the Hearing Examiner. The District Court issued an order at that time which reached the merits of the constitutional claims raised in the complaint. On appeal, this court vacated the District Court's order on the ground that because no action adverse to plaintiffs had yet been taken, the suit was premature. The case now under consideration was consolidated by the District Court with the prior suit. Since the Credentials Committee has already acted, the controversy is now ripe for adjudication.



dentials Committee, insofar as it is based on Guideline C-6, is hereby affirmed.

Guideline C-6 states:

> C-6 Slate-making
>
> In mandating a full and meaningful opportunity to participate in the delegate selection process, the 1968 Convention meant to prohibit any practice in the process of selection which made it difficult for Democrats to participate. Since the process by which individuals are nominated for delegate positions and slates of potential delegates are formed is an integral and crucial part of the process by which delegates are actually selected, the Commission requires State Parties to extend to the nominating process all guarantees of full and meaningful opportunity to participate in the delegate selection process. When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.
>
> Furthermore, whenever slates are presented to caucuses, meetings, conventions, committees, or to voters in a primary, the Commission requires State Parties to adopt procedures which assure that:
>
> 1. the bodies making up the slates have been elected, assembled, or appointed for the slate-making task with adequate public notice that they would perform such task;
> 2. those persons making up each slate have adopted procedures that will facilitate widespread participation in the slate-making process, with the proviso that any slate presented in the name of a presidential candidate in a primary State be assembled with due consultation with the presidential candidate or his representative.

3. adequate procedural safeguards are provided to assure that the right to challenge the presented slate is more than perfunctory and places no undue burden on the challengers.

When State law controls, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose.

The process by which candidates for an office are endorsed can be just as integral a part of the ultimate election as is the election itself. The Supreme Court established that principle in Terry v. Adams, 345 U.S. 461 (1953), and it applies as well with respect to the process for choosing convention delegates. The Democratic National Party determined to make participation in the nomination process as democratic as possible. This exercise of the Party's power over the qualifications of the delegates to its convention was pursuant to a reasonable regulation calculated to achieve a permissible, indeed laudable, end. The action of the Credentials Committee was taken on the basis of a clear and constitutional rule which avoided the problem of vagueness found in the application of Guideline B-6 or the mandate of the 1968 convention to ban 'winner take all' primaries. Moreover, this rule had been announced—and understood—as applicable to the selection of delegates prior to the election process.

The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the



challenged delegation. No violation of Illinois law is at issue here. The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addition to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself.

Enforcement of Guideline C-6 is thus a permissible exercise of the power of the Credentials Committee. Since the action of the District Court was properly based on its conclusion that no constitutional violation existed in the application of Guideline C-6 to the 59 Illinois delegates, Judges Bazelon and Fahy do not find it necessary to the disposition of this appeal to reach the issues the District Court decided in the other parts of its order, and they express no opinion on the validity of the reasoning or conclusions of the District Court.[6]

[6] Although Judges Bazelon and Fahy do not reach the question of the constitutionality of the action of the Credentials Committee based on rules A-1 and A-2, they find nothing in the order of the District Court which declares those rules unconstitutional. Paragraph 3 of the District Court's order of June 19, reissued on July 3, declares unconstitutional the use of any *quota* requirement to exclude a group of delegates. By their own terms, guidelines A-1 and A-2 do *not* requires a quota. All that they require is that in order to remedy past discrimination, State Democratic Parties take affirmative action

Judge MacKinnon would additionally reach, and affirm, that portion of Judge Hart's order finding that Guidelines A-1 and A-2 are unconstitutional insofar as they might be interpreted to require imposition of quotas on the composition of any delegation. The Illinois challengers have sought to justify these two Guidelines by arguing that they do not impose rigid quotas based on race, sex, age or national origin, but rather that they constitute an exhortation to the State Parties to take strong affirmative action to ensure that these segments of the population are represented in the Presidential nominating process in roughly the same proportions as they exist in the general population. Judge MacKinnon believes this argument somewhat disingenuous, and would conclude that to the extent that the guidelines obviously do create some required preferences for such groups they do represent the imposition of quotas which are a denial of equal protection of the laws to those groups that are fenced out. Believing that quotas are thus to some extent being imposed by the Credentials Committee pursuant to guidelines A-1 and A-2, Judge MacKinnon would distinguish the judicial precedents upholding such affirmative action programs in the area of employment. *See, e.g., Carter* v. *Gallager*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 40 U.S.L.W. 3557 (U.S. May 22, 1972); *United States*

(footnote continued)

to increase the participation of certain groups in Party affairs. Paragraph 4 of the District Court's order expressly approved such a requirement, and the use of an exclusion sanction to enforce it. Judges Bazelon and Fahy read Judge Hart's order to say only that guidelines A-1 and A-2 could be unconstitutional as *applied*, if they were used to justify the imposition of a quota.



v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.) *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971); *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The Democratic National Party relies heavily on *Carter*, in which Judge Gibson, writing for the Eighth Circuit sitting en banc, states:

> The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation on one constitutional guarantee by the outright denial of another.

452 F.2d at 330. Yet this acknowledged violation of the Equal Protection Clause was justified on the basis that it was necessary to provide a remedy for practices which operated to deny the constitutional right to be free from racial discrimination in employment. Judge MacKinnon considers that the Illinois election laws do not operate in a manner which deprives any individual of any race, sex, age, etc. from the right to participate in any Illinois election as a candidate or elector for any office. Absent any violation of constitutional rights in the conduct of elections in Illinois, he would find no justification for an affirmative action program here and would accordingly conclude that Guidelines A-1 and A-2 unconstitutionally deny equal protection without the necessity for doing so to protect other constitutional rights.

### The Illinois Counter-Claim

The National Democratic Party appeals from the denial of their counterclaim against the Illinois plaintiffs seek-

ing declaratory and injunctive relief barring further prosecution of an Illinois state court action previously brought by the plaintiffs against the Illinois challengers. In that state proceeding the plaintiffs sought a declaration that they were the duly elected delegates to the 1972 National Convention, and an injunction against the challengers from taking any action that would interfere with the plaintiffs' functioning as delegates to the Convention. Judge Hart based his denial of the counterclaim on the grounds that the question of the legality of the slate certified by the Credentials Committee in lieu of the plaintiffs was not before him, and that there was no justiciable issue presented in this action concerning the eligibility of the members of that slate to represent the Illinois districts in question.

In so ruling Judge Hart seems to have focused solely on the state law claims which apparently are the basis of the state proceeding, and which were not before the District Court here. However, in approving the actions of the Credentials Committee in unseating the Illinois plaintiffs and seating an alternative delegation, we have acknowledged the National Party's right to impose requirements on the delegate selection process separate from and in addition to those imposed by State law. Proper resolution of the ultimate issues raised in the state proceeding would thus require consideration of both sets of requirements, and the interests of judicial efficiency, coupled with the rapidly expiring time remaining before the start of the Convention, call for resolution of those issues in one forum. At present the Illinois plaintiff and the challengers are both parties to the state liti-



gation and to these proceedings; thus their respective interests could be resolved in either forum and the ordinary principles of federalism and comity might be thought to require us to deny an injunction against the state proceeding. *Younger* v. *Harris*, 401 U.S. 37 (1971), and companion cases. But this counterclaim is brought by the National Party, whose interest in the ultimate resolution of the questioned qualifications of the Illinois delegation is clear, yet who is not a party in the state litigation. Their presence in this forum, brought here as defendants in a suit initiated by the same class of plaintiffs who are the plaintiffs in the state proceeding provides us with justification for enjoining further prosecution of that state court proceeding.

In taking this step, we must first be careful to ensure that the requirements for such an injunction are fully met. Two types of requirements must be met; the express language of 28 U.S.C. §2283, and the doctrines of equity, comity and federalism as recently articulated in *Younger, supra,* and its companion cases. Section 2283 provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

We find that either the first or third exception to §2283 authorizes us to enjoin further prosecution by the plaintiffs of their Illinois state suit.

The National Party alleges in its Counterclaim that its First Amendment right of association would be in-

fringed by a state court declaration contradictory to the decision of the Credentials Committee to seat a delegation consisting of delegates other than plaintiffs. The Party thus grounds the jurisdiction of its Counterclaim on 42 U.S.C. §1983, which authorizes a "suit in equity" to redress the deprivation "of any rights, privileges and immunities secured by the Constitution." In *Mitchum* v. *Foster,* 40 U.S. L.W. 4737 (U.S. June 19, 1972), the Supreme Court expressly held that an action brought under §1983 is one "expressly authorized by Act of Congress" and is thus within the first exception to §2283's prohibition against enjoining state proceedings.

We also consider that an injunction is necessary to protect and effectuate our judgment upholding the action of the Credentials Committee here. The Resolution of the Committee which we have here approved provides that the 59 plaintiffs in this suit are not to be seated as the delegates to the Convention from their districts in Illinois. It also provides that 59 other persons shall be seated as the delegates from those districts. In order to protect our judgment approving this Resolution, it is necessary to enjoin plaintiffs from taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court.

Finally, we must consider whether the fundamental policy against federal interference in state litigation so strongly reaffirmed in *Younger,* with respect to criminal prosecutions, 401 U.S. at 46, bars our taking this action in the civil suit presently before us. We conclude that it does not. In *Mitchum, supra,* the Court described its holding in *Younger* as follows:



> [t]he Court clearly left room for federal injunctive intervention in a pending state court prosecution *in certain exceptional circumstances*—where irreparable injury is "both great and immediate," 401 U.S., at 46, . . . or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 401 U.S., at 54. In the companion case of *Perez* v. *Ledesma,* 401 U.S. 82, the Court said that ". . . perhaps *in other extraordinary circumstances* where irreparable injury can be shown . . . federal injunctive relief against pending state prosecutions [is] appropriate." 401 U.S., at 85.

40 U.S.L.W. at 4738. (emphasis added).

Irreparable injury, "both great and immediate," are clearly shown here. If plaintiffs were successful in their state proceedings one likely result would be that no delegates from the challenged Illinois districts could be seated at the Convention. Such a result would not just deprive the National Party of the participation of those persons whom it has selected to fill those delegate seats, more fundamentally it would deprive all Democrats residing in those districts of any voice or representation in the process by which their party's candidate for the Presidency is selected. The immediacy of this injury is clear—the Convention begins in five days—and after that the injury is wholly irreparable.

We also consider that the unique situation presented by these two cases, all interested parties represented in the federal forum and a critical party missing from the state forum; this court's familiarity with the complex of issues involved—bred and nurtured in the consideration of both the California and Illinois challenges; both actions commenced in the separate forums by the same class of

plaintiffs; and the rapidly expiring time within which any judicial action is possible—amply provide the extraordinary and unusual circumstances that call for equitable relief. For the foregoing reasons we reverse the District Court's denial of the National Party's Counterclaim, and we accordingly enjoin the Illinois plaintiffs from taking action in any other Court that would impair the effectiveness and the integrity of the judgments of this Court.

IV.

Accordingly, the motion for summary reversal in No. 72-1629 is denied; the motions for summary reversal in Nos. 72-1630, 72-1631 and 72-1628 are granted and the cases are remanded to the district court for the entry of orders consistent with this opinion.

*So ordered.*

Fahy, *Senior Circuit Judge,* concurring in Nos. 72-1629, 72-1630, and 72-1631, the Illinois cases, dissenting in No. 72-1628, the California case.

The decision of the Credentials Committee in the California case I think was within the competence of the Committee to make, subject to the will of the Convention. The contention to the contrary is that the action of the Committee deprived the plaintiffs-appellants of "life, liberty or property, without due process of law." The Committee action, however, would require the California delegation to the Convention to reflect the apparent choice in the primary of the several candidates for whom the people voted, in proportion to the votes the respective candidates received. Such a decision cannot in and of itself



be described as a denial of due process of law. Moreover, it is quite consistent with the ongoing reform movement within the Party. It is said, however, that this otherwise quite acceptable result was a deprivation of due process of law, not because the California plan of "winner-take-all" must be accepted because the statute so provides,[1] but principally because (1) there was no objection made to the statute by any candidate prior to the primary, (2) there was also evidence of its acceptance by Party officials, (3) the California legislature had recently reaffirmed the plan.[2] When the matter came before the Credentials Committee, however, that agency of the Party interpreted the reform resolution of the 1968 Convention, together with the guide-lines thereafter adopted by the National Committee, to furnish a basis for the decision it rendered apportioning the delegates. Whether or not one agrees with this interpretation, I find in it and in its result no violation of the particular provision of the Constitution upon which appellants rely, or of any other of the provisions of the Constitution. Whatever the political motivations of members of the Committee the action taken is not thereby rendered unconstitutional. I add that in my opinion the action of the Committee should not be overturned

[1] Our decision in No. 72-1629 supports the action of the Credentials Committee though the Committee did not feel bound by the Illinois statute.

[2] The extent of any detrimental reliance by the affected candidates upon the California plan seems to me wholly speculative. Moreover, no one acting in a non-partisan capacity on behalf of the voters in the California primary has sought participation in this litigation to contest the action of the Credentials Committee.

merely because it operated retroactively, as any decision of a court or agency usually does. *Cf. Chenery* v. *S.E.C.*, 332 U.S. 194 (1947). I accordingly would leave the matter for resolution by the Party, soon to meet in Convention, without the court intervening by decree to set aside the action of the Committee.

It does not appear to me that the fairness of the process of electing the President of the United States is endangered either by the action of the Credentials Committee in apportioning the delegation according to the votes for each candidate in the primary, or by the Committee's interpretation of its authority, stemming primarily from the 1968 Convention, considered with the guide-lines subsequently promulgated by the McGovern-Fraser Commission, and approved by the National Committee. These guide-lines, largely relied upon by the court, provide as follows with respect to their own status:

> "Because the Commission was created by virtue of actions taken at the 1968 Convention, we believe our legal responsibility extends to that body and that body alone. We view ourselves as the agent of that Convention on all matters related to delegate selection. Unless the 1972 Convention chooses to review any steps the Commission has taken, we regard our Guidelines for delegate selection as binding on the states."

Thus, as it seems to me, the guide-lines, in their reference to the 1972 Convention, afford greater latitude to the Credentials Committee in making its recommendation to the Convention than the court permits.



## APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 72-1629
THOMAS E. KEANE, ET AL, APPELLANTS,
v.
NATIONAL DEMOCRATIC PARTY, ET AL.

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No. 72-1630
THOMAS E. KEANE
v.
NATIONAL DEMOCRATIC PARTY, ET AL., APPELLANTS

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No. 72-1631
THOMAS E. KEANE, ET AL.
v.
NATIONAL DEMOCRATIC PARTY, ET AL.,
WILLIAM COUSINS, ET AL., APPELLANTS

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On Remand from the Supreme Court of the United States

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Decided February 16, 1973

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge* and MACKINNON, *Circuit Judge*.

Opinion Per Curiam.

Opinion concurring in part and dissenting in part by Circuit Judge MacKinnon at p. 3.

PER CURIAM: On October 10, 1972, the Supreme Court vacated the judgment of this court in this cause and remanded the cause to this court to determine whether the case has become moot. Accordingly, the case is before us now (1) on the appeal of Keane et al., plaintiffs in the District Court, from the judgment of that court denying the declaratory and injunctive relief plaintiffs requested and dismissing their complaint, and (2) on the appeals of the National Democratic Party et al., defendants, and of intervenor-defendants, Cousins et al., from the judgment of the District Court denying the declaratory and injunctive relief sought in the counter-complaint filed by the defendants.

In the period intervening since the action of the District Court the 1972 Convention of the National Democratic Party, acting within its competence, seated at the Convention the delegation whose right thereto was contested by plaintiffs, Keane et al., in the District Court. Insofar as the complaint involved such right of representation the case thus became and is now moot.

Insofar as the complaint involves questions as to rights of the competing delegates to post-Convention representation in National Democratic Party matters, we think the case is not moot. This court being advised, however, that these questions are pending before the Credentials Committee of the National Committee of the Party, we find no equitable basis upon which the District Court or this court should now intervene by declaratory or injunctive relief.

Insofar as the case involves the request for injunctive or other relief sought by intervenor-defendants, Cousins



et al., or previously though no longer sought by the National Democratic Party et al., defendants, we are also of the opinion that no exceptional circumstances appear to justify now the relief requested.

By reason of the foregoing, the judgment of the District Court dismissing the complaint and counter-complaint is affirmed.

MACKINNON, *Circuit Judge*, concurring in part and dissenting in part: As I view the complaint it sought only the seating of the Keane delegates at the Democratic National Convention and that issue has been determined by the Supreme Court staying our judgment and by the subsequent action of the Democratic National Committee seating the anti-Keane delegation. I do not consider that this lawsuit involves questions as to the collateral consequences of that action or as to the actions taken by the Democratic Party subsequent to the adjournment of the convention.

However, I do not consider that the action is moot insofar as it seeks a declaration that "the Rules of the Democratic National Party violate the First, Fourteenth and Fifteenth Amendments to the U.S. Constitution and the Civil Rights Act of 1871." Complaint of Plaintiff at p. 13. In our earlier opinion, *Brown* v. *O'Brien*, —— U.S.App. D.C. ——, 469 F.2d 563 (1972), we passed upon such issues to the extent necessary and upheld the constitutionality of Guideline C-6 sufficiently to decide that petitioners Keane, et al. were not entitled to be seated at the convention. While the Supreme Court thereafter vacated our judgment, *Keane* v. *Nat. Democratic Party*, 41 U.S.L.W.

3182 (U.S. Oct. 10, 1972), the issue as to the constitutional validity of Guideline C-6 continues, is almost certain to recur and the timing of its likely reoccurrence close to our national presidential elections would make it evasive of review within the time available. *Moore* v. *Ogilvie,* 394 U.S. 814 (1969). I would therefore reinstate our judgment insofar as it upholds the constitutional validity of Guideline C-6.



## APPENDIX F.

Paul T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated, Plaintiffs,

v.

William COUSINS et al., Defendants.

No. 72 C 1001.
United States District Court,
N. D. Illinois, E. D.
May 17, 1972.

### MEMORANDUM OPINION

WILL, District Judge.

Plaintiff originally brought this action in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, seeking 1) to have himself and others similarly situated declared duly elected delegates and alternates to the 1972 Democratic National Convention (the "Convention") in accordance with Illinois law and therefore entitled to take their seats at the Convention; and 2) to enjoin the defendants from taking any action that would interfere with plaintiff's functioning as delegates and alternates to the Convention. Defendants removed the case to this Court pursuant to 28 U.S.C. § 1446, alleging that the case was properly removable to a Federal Court under 28 U.S.C. §§ 1441 and 1443. Plaintiff then

moved to have the case remanded back to the State Court pursuant to 28 U.S.C. § 1447(c) on the ground that this Court lacks jurisdiction over the subject matter of the dispute. Inasmuch as we find that there is no basis for federal jurisdiction over the subject matter of this dispute, we grant plaintiff's motion and remand the case to the Circuit Court of Cook County.

Before proceeding with an examination of the possible jurisdictional bases for this cause of action, a more detailed statement of the relevant facts is necessary. In a primary election held in Illinois on March 21, 1972, plaintiff and the class he purports to represent (the "uncommitted delegation") were elected as "uncommitted" delegates and alternates to the Convention. That they were elected in accordance with the provisions of the Illinois Election Code relating to the selection of delegates to a national convention of a political party, Ill.Rev.Stat. ch. 46 §§ 7-14 and 7-14.1, is not disputed. On March 31, the defendants filed with the Acting Chairman of the Credentials Committee of the 1972 Democratic National Convention (the "Credentials Committee") a "Notice of Intent to Challenge" the seating of the members of the plaintiff class as delegates and alternates to the Convention.

Thereafter, the defendants additionally filed a "Statement of Grounds of Challenge Against the Proposed 'Uncommitted' Delegates to the 1972 Democratic National Convention from the Districts Encompassing the City of Chicago" in which they alleged that the members of the plaintiff class were selected in violation of the Rules adopted by the Democratic National Committee and incorporated into the Call of the 1972 Democratic National



Convention which set forth standards and qualifications to be met in the selection of delegates from each of the states to the Convention (the so-called "McGovern Rules"). Specifically, the defendants contend that "[b]lacks, Latin Americans, women and young people are grossly underrepresented on the Proposed Delegation and in all Chicago party affairs" and that "the Proposed Delegation was slated, endorsed, and supported by the party organization without open slate-making procedures, without published rules and by party officials chosen prior to 1972."

On April 19, plaintiff filed a civil action in the Circuit Court of Cook County, County Department, Chancery Division, asking the court: 1) to declare plaintiff a proper class representative of the "uncommitted" delegates and alternates to the Convention; (2) to declare all members of the plaintiff class to be duly elected delegates and alternates in accordance with Illinois law and therefore entitled to take their seats as such at the Convention; 3) to enjoin the defendants from taking any action which would interfere with members of the plaintiff class functioning as delegates and alternates (e. g., pursuing their challenge with the Credentials Committee); and 4) to grant any other appropriate relief. On April 20, defendants filed a petition for removal of that action to this Court pursuant to 28 U.S.C. § 1446. On April 21, plaintiff filed a motion for preliminary injunction in the Circuit Court of Cook County which became dormant due to the removal of the case to this Court.

On April 24, plaintiff moved to have the case remanded to the state court pursuant to 28 U.S.C. § 1447 on the

ground that this Court lacks judisdiction over the case. In addition, plaintiff moved for an order temporarily restraining defendants from proceeding with their challenge to the Credentials Committee. Both motions were taken under advisement pending a determination whether we have jurisdiction. On May 2, plaintiff submitted a motion for a preliminary injunction enjoining defendants from proceeding before the Credentials Committee.

After discussion with plaintiff's counsel in open court, the Court ruled on the question of enjoining defendants pending a determination of the jurisdictional question. The motion for a preliminary injunction and the motion for a temporary restraining order were denied on May 2, inasmuch as there had been no showing of immediate and irreparable harm as required by Rule 65(b), Fed.R.Civ.P., and because the underlying claim for relief in the case—an order enjoining the defendants from exercising their First Amendment rights within procedures set up by a national political party—raises substantial constitutional questions which ought not be resolved on a motion for a temporary restraining order or preliminary injunction but only after a full hearing on the merits.

Given that background of the case, it must now be determined whether this Court has jurisdiction over the subject matter of the dispute. In their petition for remand, defendants have asserted two statutory bases for removal jurisdiction—28 U.S.C. §§ 1441 and 1443—each of which will be discussed separately.

## I. SECTION 1441

In essence, section 1441 provides that removal is permissible if the federal court to which the action is being



removed would have had jurisdiction over the subject matter and parties if the action had originally been brought in that federal court. Inasmuch as the parties to the instant action are all citizens of Illinois, in order for removal to be proper under § 1441, the action must have been maintainable, if brought here originally, under federal question jurisdiction, 28 U.S.C. § 1331, i. e., the matter in controversy must exceed $10,000 in value and arise under the Constitution, laws, or treaties of the United States.

The defendants have proffered several bases for federal question jurisdiction, asserting that the controversy arises under the Constitution of the United States—Article II § 1, 1st Amendment, 14th Amendment, and 15th Amendment. It is important to note initially that any basis for federal jurisdiction must stem solely from the allegations of the complaint. Great Northern Ry. Co. v. Galbreath Cattle Co., 271 U.S. 99, 46 S.Ct. 439, 70 L.Ed. 854 (1926); Gully v. First National Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970). See also, Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). The defendants' primary argument is that, since the case involves a controversy connected with the election of the President of the United States, albeit several steps removed from the formal selection of the President by the Electoral College pursuant to Article II § 1, as amended, it arises under the Constitution. They argue that the request in the complaint that the court declare that the uncommitted delegation is entitled to sit as such at the Convention raises the question

whether the selection of this uncommitted delegation in accordance with Illinois election laws constitutes a bar to a challenge under the rules of the National Democratic Party and that this question can only be decided under the Federal Constitution.

No case has been cited in support of this argument apparently because it is a question of first impression. We hold that the eligibility of delegates to a national party convention is not within the scope of Article II § 1, as amended by the 12th Amendment. To conclude otherwise would be to open the federal courts to a wide variety of controversies, for, under the same logic, almost any controversy can somehow be related to a general provision in the Constitution. The mere fact that this controversy centers around a preliminary process pertaining to the selection of the President without more does not confer jurisdiction over that controversy upon the federal courts.

This is not to suggest that the qualifications and eligibility of delegates to national political party conventions is properly determinable by state law or by state courts. If it were, each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. The proper forum for determination of the eligibility of delegates to serve at such a convention is the Credentials Committee of the party or the convention. This is clearly a question of political party policy which is not justiciable, if at all, unless and until the Credentials Committee acts and then only if its actions violate fundamental constitutional rights.



The state election laws are applicable only to the extent that they regulate the manner of selection of delegates and are not applicable to their qualifications or eligibility to serve.

The several other grounds asserted by the defendants cannot support federal jurisdiction in the instant case since they can arise in the lawsuit only by way of defense and not from the complaint. *See,* Great Northern Ry. Co. v. Galbreath Cattle Co., and related cases cited *supra.* Undoubtedly, the issue of whether an order can be entered enjoining the defendants from pursuing what is seemingly a legitimate challenge to the Illinois delegation before the Credentials Committee without clearly violating defendants' 1st Amendment rights, as protected through the due process clause of the 14th Amendment against state interference, involves a federal question. Given the complaint in this case, however, that issue can only be raised by way of defense. Likewise, the underlying issues of whether certain allegedly underrepresented classes of people are being deprived of the equal protection of the laws and of protected voting rights can only be raised by way of defense.

We have considered other possible sources of federal jurisdiction and found them also lacking. First, the question of the relative supremacy of the rules of a national political party vis-a-vis state law, which was alluded to in defendants' memorandum in support of its petition for removal, cannot support federal jurisdiction in the instant case. An alleged conflict between state law and the rules of a national political party is not tantamount to a conflict between state law and federal law. To hold that the complaint in this case necessarily involves the Supremacy

clause of the Constitution, i. e., Article VI, would require a holding that the rules adopted by a political party are the equivalent of statutes passed by the Congress. Again, this is not to say that state law predominates over national party rules where they conflict. On the contrary, any attempt by an individual state to control a national convention of a party will necessarily fail due to the limits of its own jurisdiction.

The Texas White Primary Cases—Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Teryr v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953)—all involved federal courts asserting federal question jurisdiction over the state primary elections of local political parties. However, the complaints in those cases alleged racial discrimination in violation of the 14th and 15th Amendments which provided the federal jurisdiction. The Reapportionment cases, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) together with its predecessors and progeny, all involved allegations in the complaints of denials of equal protection or due process. No such allegations as in these two groups of cases are present in the instant complaint. Nor are there federal statutes which even tangentially could be applicable to the instant fact pattern. In addition, neither of the recent constitutional amendments forbidding the imposition of a poll tax and providing for the 18 year old vote, both of which are applicable to primary elections, arise in this case by virtue of the complaint.

Accordingly, we find that § 1441 affords no basis for federal jurisdiction over the instant case for purposes of removal.



## II. SECTION 1443

There are two possible bases for removal under this section.

1. *Subsection 1443(1).* This provision allows for removal of any civil or criminal action "against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens. . . ." This has been construed to mean that removal is allowed under this subsection only when it can be clearly predicted by operation of a pervasive and explicit law or pattern that federal rights will inevitably be denied by the very act of going to trial in the state court. Greenwood v. Peacock, 384 U.S. 808, 824, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). Inasmuch as there has been no allegation that the defendants cannot raise their constitutional defenses and claims in the state court, and since it is clear that no constitutional deprivation will arise by merely defending the state action, removal is not proper under this subsection.

2. *Subsection 1443(2).* This provision allows for removal of any civil or criminal action "for any act under color of authority derived from any law providing for equal rights. . . ." In order for removal to be proper under this subsection, the defendants must have done some act about which they are about to be sued, that act must have been under color of authority of any federal law providing for equal rights, and the defendants must have been federal officers performing their duties under the above mentioned law. Greenwood v. Peacock, *supra.* In the instant case, there is no question that the defendants are being sued for an act which they have done and currently are

doing—the presentation of a challenge to the uncommitted delegation to the Credentials Committee. With respect to the second requirement, defendants argue that it has been fulfilled since they are enforcing the McGovern Rules which do indeed deal with equal rights by providing for a more equal representation of the citizenry within the Democratic Party. Clearly, however, the McGovern Rules are not federal law, as has been discussed above. Moreover, the defendants are not federal officers. Their argument that by enforcing the McGovern Rules they are performing the essential duties of federal officers and therefore *are* federal officers hinges on the characterization of those rules as federal law. Inasmuch as such a characterization cannot be made, the defendants cannot be characterized as federal officers. Since the defendants are not federal officers enforcing federal law, removal is not proper under § 1443(2).

In brief summary, plaintiff's motion to remand the case to the Circuit Court of Cook County must be granted since there is no jurisdictional basis for this federal court to hear it. However, to say that this controversy in its present posture cannot be litigated and resolved in the federal court does not, as previously indicated, imply that it must, will, or can properly be resolved in the state court. That court faces serious jurisdictional difficulties as well and, even if those initial barriers are overcome, it is difficult to imagine any thoughtful court granting the type of relief requested in the instant case.

An appropriate order consistent with the foregoing will enter.



**APPENDIX G.**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
June 30, 1972

Honorable WALTER J. CUMMINGS, *Circuit Judge*
Honorable WILBUR F. PELL, *Circuit Judge*
Honorable JOHN PAUL STEVENS, *Circuit Judge*

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NO. 72-1455

WILLIAM COUSINS, PATTY CROWLEY, BARBARA HILLMAN, REV. JESSE JACKSON, CATHY KENNEDY, MARY LEE LEAHY, ANNA LANGFORD, ALBERT RABY, WILLIAM SINGER and MIGUEL VELAZQUEZ,

Plaintiffs-Appellees,

v.

PAUL T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated,

Defendant-Appellant.

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Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 72 C 1108,
Frank J. McGarr, Judge

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MEMORANDUM

PER CURIAM.

At the conclusion of oral argument on June 29, 1972, this court entered an order vacating the injunction issued by the district court on June 9, 1972. This memorandum will briefly summarize the proceedings and the basis for our conclusion that the injunction had been improvidently entered.

I.

This litigation was commenced on May 3, 1972, when plaintiffs, to whom we will sometimes refer as "Cousins, et al.," filed their complaint in the United States District Court for the Northern District of Illinois. The material facts are as follows.

On April 18, 1972, the Secretary of State of the State of Illinois proclaimed that defendant Wigoda and certain other persons (hereinafter sometimes referred to as "Wigoda, et al.") had been duly elected as delegates to the 1972 Democratic Convention. The complaint alleged that Wigoda represented a class of delegates and alternates from eight specific Illinois congressional districts.

Cousins, et al., are residents of Cook County, who on March 31, 1972, filed with the Credentials Committee of the Convention a notice of intent to challenge the seating of Wigoda, et al., at the Convention. On April 6, 1972, plaintiffs filed a statement of grounds for the challenge alleging, in substance, that defendant Wigoda and members of his group had been selected as delegates in violation of the Rules of the National Democratic Party. Neither the challenge nor the complaint before us charged that there had been any violation of the Illinois Election Code or that any question as to the eligibility of Wigoda, et al., had been raised before the election was conducted.



On April 19, 1972, the day after the Secretary of State certified the results of the Illinois election, defendant Wigoda filed a complaint for injunction and other relief and a motion for preliminary injunction in the Circuit Court of Cook County. That complaint (hereinafter "the state complaint") alleged in detail that Wigoda, et al., had complied with the various provisions of the Illinois Election Code pertaining to the election of delegates to the Convention, described the filing of the challenges and statement of grounds with the Credentials Committee of the Convention, and alleged that the challenge, if successful, would interfere with Wigoda's right to serve as a delegate and undermine the results of an election lawfully conducted in compliance with Illinois law. The state complaint prayed for a judgment declaring that Wigoda, et al., had been duly elected and were therefore entitled to be seated at the Convention and to fully participate therein. The state complaint further prayed: "That defendants be enjoined from taking any action, the purpose, intent or effect of which would be to interfere with or impede the functioning of plaintiff and the delegates and alternates in their duly elected office." After filing the state complaint on April 19, Wigoda's counsel notified Cousins, et al., that a motion for a preliminary injunction would be presented before Judge O'Brien on April 21 at 10:00 o'clock A.M.

On April 20 the Cousins group removed the state litigation to the federal court. Wigoda then moved in the federal court for an order remanding the case to the Circuit Court of Cook County. That motion was taken under advisement and finally granted on May 18, 1972. However, on that date the district judge stayed the remand for ten days to permit review by this court. We extended

the stay in order to receive briefs from the parties; on June 7 we terminated the stay, finding that "the probability of a successful appeal is minimal."

Meanwhile, as already noted, the federal complaint was filed on May 3, 1972. In that complaint Cousins, et al., described the challenge which they had filed with the Credentials Committee of the Democratic Convention and the state complaint filed on behalf of Wigoda, et al. They further alleged that they were preparing to hold political meetings and caucuses within the City of Chicago to select persons, pursuant to the Rules of the Democratic Party, to represent Democrats from the City of Chicago at the 1972 Convention; that the state complaint was "frivolous as a matter of law," but nevertheless the threat of a circuit court injunction "discourages persons from participating in the political meetings and processes" which are being carried on for the purpose of challenging the elected delegates and selecting substitutes.

On May 25, 1972, Judge McGarr entered a temporary restraining order. He found that to the extent that the state complaint sought to prevent the Cousins group from going forward with their challenges under the Democratic Party Rules or from speaking, meeting, or preparing to seek recognition of an alternate slate of delegates, it sought an unsupportable interference with Cousins, et al.'s constitutionally protected rights, and must be construed to be on its face indicative of sufficient bad faith and harassment to warrant the intervention of the federal court.

On June 9, 1972, the court conducted a hearing on the Cousins motion for preliminary injunction. The plaintiffs



presented three witnesses: Witness Bode described the development of certain so-called "reform rules" of the Democratic National Convention. Witness Singer described the progress of the challenge before the Credentials Committee and the adverse effect of a possible injunction. Witness Barbara Hillman testified that her husband had expressed concern about her and her sister's involvement because of a possible injunction. The district court then reaffirmed the findings which it had made on May 25, 1972, in support of the temporary restraining order, and stated that the evidence heard on June 9 established that the pendency of a prayer for injunctive relief in the state complaint "does have something of a chilling effect on the caucusing and other described activities of the plaintiffs in connection with their challenge to the elected delegates." He found that to the extent that the state complaint sought injunctive relief it was brought "in bad faith," although he expressly disclaimed any intent to accuse counsel for Wigoda of improper conduct. The conclusion was predicated on the court's opinion that the state complaint's request for injunctive relief was "unsupportable" and had "no likelihood of success."

In his injunction order the district judge expressly allowed Wigoda, et al., to pursue that aspect of the state case requesting a declaratory judgment, but the court restrained Wigoda from interfering with the challenge or the selection of an alternative set of delegates and alternates.

It is that order from which Wigoda, et al., have appealed and which we have vacated.

## II.

Although a federal court has power to grant an injunction to stay litigation in a state court, *Mitchum* v. *Foster*, —— U.S. ——, 40 U.S.L.W. 4737 (June 19, 1972), "principles of equity, comity, and federalism" dictate restraint in the responsible exercise of that power. *Id.* at 4742. The underlying policy was described by Mr. Justice Black in *Younger* v. *Harris*, as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." 401 U.S. 37, 44.

Although those considerations may be less compelling when the state litigation is civil rather than criminal, see *Younger* v. *Harris*, 401 U.S. at 55, note 2 (Mr. Justice Stewart concurring), they require special respect for the state judicial process if federal jurisdiction is not invoked until after state litigation is commenced. Cases such as *Wisconsin* v. *Constantineau*, 400 U.S. 433, in which no state litigation had been commenced, or was even threatened, did not involve the same potential conflict between courts of overlapping jurisdiction.

There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not yet disputed those allegations, but retains the right to do so. Moreover, assuming vacancies in the slate of delegates may



occur, by death, resignation, or by the successful prosecution of one or more challenges before the Credentials Committee of the National Convention, Illinois law may control, or may affect, the manner of selecting substitutes or alternates.[1] Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues.[2]

Cousins, et al., argue that the underlying issue is what forum—the Illinois courts or the National Convention—should decide the merits of (a) their challenge, and (b) their right to serve as substitute delegates. Neither side suggests, however, that the issues should be resolved in a federal forum, or at least in a federal district court which does not have jurisdiction of the Convention or its Creden-

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[1] 46 Smith Hurd Ill. Stat. Anno. § 7-1 provides:

> "Except as herein otherwise provided, the nomination of all candidates . . . for the election of . . . delegates and alternate delegates to National nominating conventions by all political parties . . . shall be made in the manner provided in this Article 7, *and not otherwise*." (Emphasis added.)

Cousins, et al., argue that the Code does not provide the exclusive method of selecting delegates to represent the State of Illinois at the National Democratic Convention, but they have not identified for us the legal basis for an alternative method of selection.

[2] For example, an exhibit attached to plaintiffs' complaint sets forth certain Democratic Party guidelines which state, in part, on the subject of slate-making:

> *"When State law controls*, the Commission requires State Parties to make all feasible efforts to repeal, amend or otherwise modify such laws to accomplish the stated purpose." (Emphasis added.)

tials Committee.[3] It is perfectly clear, therefore, that the entire controversy cannot be resolved in the United States District Court for the Northern District of Illinois.

To what extent the courts of Illinois must defer to the Credentials Committee, and conversely to what extent the Credentials Committee should defer to the law of Illinois in selecting delegates to represent that state, are matters which were not raised or argued in the court below. In our view these basic and underlying issues must be developed in an orderly fashion in either or both of the two fora which do have an appropriate part to play in resolving the dispute between the parties. Thus, when Cousins, et al., filed their complaint in the federal district court, there was pending in the courts of Illinois litigation in which state law issues were properly raised. The question presented to the district court was whether, having a due regard for the principles of comity which must govern, the relationship between federal and state tribunals, a showing of such threatened irreparable injury to federally protected rights had been made as to require the extraordinary relief of entering an injunction which would inevitably interfere with the orderly progress of pending litigation.

The showing made by Cousins, et al., was in two parts. They contend that the prayer for relief in Wigoda's state complaint was overly broad and patently frivolous. They therefore argue, first, that if the state court should grant

[3] Even if the final determination is to be made by the National Convention, it does not necessarily follow that the decision of State law issues by an Illinois tribunal will impair the work of the Convention. *Cf., Roudebush* v. *Hartke,* 405 U.S. 15, 26.



the complete relief for which Wigoda prayed in his state complaint, their vital First Amendment rights would be abridged; and second, that the mere pendency of a complaint containing such a broad prayer for relief had an immediate "chilling effect" on the exercise of those rights. The district court relied primarily on the first contention, but also, after hearing evidence, found that the complaint itself "does have something of a chilling effect." We consider the two bases for federal intervention in state litigation separately.

*First*: Plaintiffs have not alleged or attempted to prove that they will not receive a fair trial in the courts of Illinois, or that the state judicial system will not fully honor and protect their constitutional rights. If, therefore, they are correct in construing the prayer for relief as frivolous and overly broad, we cannot presume that such relief would be granted by an Illinois chancellor, or if granted would be sustained on direct review. Unless some showing is made to the contrary, we must assume that an Illinois court would properly determine the merits of any federal issue properly presented to it. The mere possibility, unsupported by allegation or evidence, that a state judge might make a flagrantly erroneous ruling on a federal issue is an insufficient basis for federal intervention in the orderly progress of state litigation.

On the other hand, if the prayer for injunctive relief in the state complaint is not entirely frivolous, and there is some area in which state interests require vindication, the ability of the state tribunal to appraise the issues fairly and to fashion the appropriate relief must certainly be impaired by an outstanding federal order which broadly pro-

vides that a state chancellor may go thus far and no farther. The validity of constitutional contentions often turns on a precise delineation of the relevant facts and applicable provisions of state law. Inevitably, the district court's partial stay of the proceedings in the state court will impair the orderly definition and decision of the relevant issues.

We recognize that the time available for appellate review of any order which may be entered by an Illinois chancellor is now extremely limited, since the Convention will soon convene. More time would have been available if Cousins, et al., had mounted their attack before the Illinois election was held in March, or if they had met the state complaint when it was filed on April 18, 1972. The delay in the proceedings since that date cannot be charged to Wigoda, et al. But even if there had been no delay, our responsibility to approve or disapprove of the injunctive order entered by the court below must be based on the record made in that court before the order was entered.

Thus, assuming without deciding that the state complaint contains a frivolous and overly broad prayer for relief which, if granted *in haec verba,* would impair the First Amendment rights of Cousins, et al., we hold that the mere existence of such a possibility does not justify a federal court's entry of an order effectively excising that prayer from the state complaint. The partial stay of the state proceeding cannot be supported by mere speculation that an Illinois chancellor might commit flagrant error. The principles of comity and federalism which the Supreme Court has repeatedly emphasized demand a higher respect for the state judiciary.



*Second:* Cousins et al., argue that even if the Illinois courts will not grant overly broad relief, the mere pendency of a frivolous claim evidences "bad faith," "harassment," and has a "chilling effect" on the exercise of their First Amendment rights. We are unpersuaded by this argument.

The district court did not stay the entire state proceeding. He assumed, as do we, that the entire proceeding was not initiated in bad faith and is not frivolous. The objection is to only a portion of the prayer for relief. Assuming that such portion is frivolous and overly broad, that mere fact is insufficient to support a finding of harassment or bad faith. We need not approve the accepted practice of lawyers who routinely include excessive prayers in their pleadings to hold that such legal draftsmanship is not the kind of conduct which the Supreme Court described as "bad faith" or "harassment" in *Dombrowski* v. *Pfister,* 380 U.S. 479. The district court order clearly cannot be supported by a finding of bad faith or harassment.

Cousins, et al., argue, however, that such findings are unnecessary if they establish a "chilling effect" on their First Amendment rights and consequent irreparable injury. We find the evidence of such "chilling effect" singularly unpersuasive, and we find no evidentiary basis whatsoever for a finding of irreparable injury. The district court's tentative statement that the evidence discloses "something of a chilling effect" interpreted the record liberally in plaintiffs' favor. That ambiguous finding is, in our view, inadequate to justify federal intervention in state litigation. Moreover, the actual evidence of a chilling effect falls far short of the kind of showing made in *Dombrowski, supra.*

Plaintiffs' evidence showed no impairment whatever of their conduct of challenges to Wigoda, et al., before the Credentials Committee of the Convention; nor did it disclose any restraint on their right to assemble and to speak out in favor of the selection of an alternate slate of delegates. Most liberally construed, the evidence merely indicated some reluctance by third parties to rally to the Cousins cause because of concern that the entire effort might be aborted. But such evidence related to the persuasive impact of the arguments advanced by Cousins, et al.; it did not prove any impairment of their right to assemble or to speak out publicly. We find it anomalous that the Cousins group, which includes experienced lawyers and persons who hold themselves out as qualified to represent the State of Illinois in the robust political controversies which a National Party Convention must resolve, should contend that the mere pendency of an unanswered complaint containing an overly broad prayer for relief has a significant "chilling effect" on the exercise of their First Amendment rights. Had the district court made an unequivocal finding to that effect on the evidence that was actually presented to him, we have no doubt that such a finding would have been clearly erroneous.

Plaintiffs clearly failed to establish the kind of irreparable harm which may, in exceptional cases, justify a federal district court's entry of an order restraining the orderly prosecution of state litigation already on file.



UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 30, 1972

Before
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

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WILLIAM COUSINS, PATTY CROWLEY, BARBARA HILLMAN, REV. JESSE JACKSON, CATHY KENNEDY, MARY LEE LEAHY, ANNA LANGFORD, ALBERT RABY, WILLIAM SINGER and MIGUEL VELAZQUEZ,

Plaintiffs-Appellees,

No. 72-1455 vs.

PAUL T. WIGODA, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention, etc.,

Defendant-Appellant.

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Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
(72 C 1108)

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PELL, Circuit Judge, dissenting.

I respectfully dissent from the order entered by the majority of the panel from the bench on June 29, 1972, which order vacated the preliminary injunction entered by the district court.

This court has a very limited scope of review in an appeal from the granting of a preliminary injunction. The sole issue is whether the district court abused its discretion.[1]

I would hold that the district court did not abuse its discretion.

The question before us is not how we might have decided the issues before the district court as a de novo matter but we should only look at the merits to the extent necessary to determine whether the district court abused its discretion.[2]

This court is not permitted to substitute its opinion for the finding of the district court where the record furnishes a reasonable basis for the finding and action of the district court.[3]

To justify an interlocutory injunction it is not necessary that the plaintiffs' right to a final decision, after a trial, be absolutely certain or wholly without doubt.[4]

> "This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success a final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief. Weighing these considerations is the responsibility of the district judge; only a clear abuse of his discretion will justify appellate reversal."[5]

The balancing processes here involved are the traditional function of the equity, not appellate, court.[6]

Indeed, it has been stated that the appellate court's ruling in this particular review situation may not be invoked as res judicata nor will it become the law of the case.[7]

When the preliminary injunction has been issued to preserve the status quo, pending a determination on the merits, it is not necessary that the trial court find the certainty of a wrong, a likelihood is sufficient.[8]

Additional background matter should be observed. Until a very few days ago, uncertainty existed as whether the anti-injunction statute (28 U.S.C. §2283) barred a civil rights action (42 U.S.C. §1983) to enjoin civil proceedings in a state court. The Supreme Court held on June 19, 1972, that it did not.[9]

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[1] *Minnesota Mining & Mfg. Co.* v. *Polychrome Corp.*, 267 F.2d 772, 775 (7th Cir. 1959).

[2] *Industrial Bank of Washington* v. *Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968).

[3] *Mytinger & Casselberry, Inc.* v. *Numanna Lab Corp.*, 215 F.2d 382, 385 (7th Cir. 1954).

[4] *Mytinger, supra*, at 385.

[5] *United States Steel Corp.* v. *Fraternal Ass'n of Steelhaul.*, 431 F.2d 1046 (1970).

[6] *Locomotive Engineers* v. *M-K-T R. Co.*, 363 U.S. 528, 535 (1960).

[7] *Mesali Iron Company* v. *Reserve Mining Company*, 270 F.2d 567, 570 (8th Cir. 1959).

[8] *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 111 (7th Cir. 1970).

[9] *Mitchum* v. *Foster*, 40 L.W. 4737 (1972).

Further, it appears that the thrust of the cases sometimes categorized as the *Younger* v. *Harris*[10] decisions is that the federal courts will refrain from inhibiting action directed toward pending state criminal proceedings.

As a final matter of background, or context within which we should consider the present appeal, generally an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary or, putting it another way, discretion is abused only where no reasonable man would take the view adopted by the trial court.[11]

The ultimate merits of the law suit below revolve around the question of whether the determination of the qualifications and identity of delegates to the 1972 Democratic National Convention is governed by state law, by rules of the National Democratic Party or possibly by some combination of both. It cannot be gainsaid that the national conventions of the two major political parties of this country will have a direct and extremely significant effect upon the government of this nation for the next four years. The public generally and each state, by virtue of its representation at those conventions, have a substantial interest in the composition of the national party conventions. This no doubt is also true of the various sectors of the voting

[10] *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971) and *Byrne* v. *Karalexis*, 491 U.S. 216 (1971).

[11] *Particle Data Laboratories, Inc.* v. *Colter Electronics, Inc.*, 420 F.2d 1174, 1178 (7th Cir. 1969).



populace who supposedly were assured representation by the newly adopted convention guidelines—blacks, women and the young. Meritorious arguments, on the other hand, can be advanced on behalf of delegates elected at an open election, in which anyone could (as many did) run by filing a nomination petition containing a relatively minimal number of signatures.

These merit matters, however, are not really involved in the posture of the litigation before us. We are, or should be, only concerned with whether the granting of the preliminary injunction in this particular case constituted an abuse of discretion.

Basically, the plaintiffs in the court below asserted they had rights under the First Amendment to make political speeches, to discuss with the press and to hold political meetings. They have taken steps to exercise these rights. There has been no real contention that these are not guaranteed federal rights which should be protected. The state court complaint filed by the defendants seeks an injunction. The prayer of the state court complaint is couched in terms of enjoining interference with elected delegates functioning as such. We need only look at the complaint in the federal court below to ascertain what the proposed interference is. That, in essence, is nothing more nor less than the exercise of guaranteed First Amendment rights.

I find it difficult to say a district court has been arbitrary or has abused its discretion when preliminarily enjoining pursuit of a state court action whose end purpose is to suppress the rights of freedom of speech and freedom of assembly. The mere imposition of the necessity of defending against a lawsuit seeking to suppress and put down

the exercise of rights seems to me to be an impermissible chilling of those rights.

It is insufficient, it seems to me, to say that the state courts as well as the federal courts protect federal rights. There should, as a threshold matter, be no necessity for having to go into state court to defend those federal rights.

As Mr. Justice Harlan so aptly put the matter:

> ". . . timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."[12]

We do not view matters with hindsight in considering the determination of cases. Nevertheless, it is of interest to note the sequel of the panel's action in vacating the preliminary injunction as related in the Chicago Sun-Times of June 30, 1972, as follows:

> "A Circuit Court judge Thursday issued a temporary restraining order barring the Chicago challengers from seeking to take the seats of 59 Daley organization delegates to the Democratic National Convention.
>
> "Circuit Court Judge Daniel O'Brien acted almost immediately after a three-judge federal panel dissolved an injunction that had prevented organization attorneys from seeking the order against the challengers.
>
> "O'Brien acted in the absence of attorneys for the challengers, who had flown to Washington for a national party Credentials Committee hearing on the challenge."

[12] *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 163 (1968).



Irrespective of what subsequent action the state court took, or might take, I am of the opinion that we as a reviewing court should not have determined, when viewing all of the factual circumstances including timing[13] in the light of the applicable legal context, that the district court had abused its discretion. The real likelihood of a constitutional wrong should have been sufficient to sustain the action below.

[13] The National Democratic Convention is scheduled to commence July 10, 1972, and plaintiffs were at the time of the vacation of the order in the process of asserting their claimed rights before a committee of the National Democratic Party.

## APPENDIX H.

Opinion in Chambers

COUSINS ET AL. *v.* *WIGODA*

ON APPLICATION FOR STAY

No. A—1. Decided July 1, 1972

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants have applied to me as Circuit Justice to stay an order entered by the Court of Appeals for the Seventh Circuit on Thursday, June 29. A divided panel of that court vacated an injunction issued at applicants' behest by the District Court for the Northern District of Illinois and further ordered that its mandate issue immediately. Because applicants' application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.

In April 1972, following the Illinois primary election, respondent Wigoda brought an action in the circuit court of Cook County, Illinois, requesting a declaratory judgment that he and others had been duly elected as delegates to the Democratic National Convention in accordance with Illinois law, and seeking an injunction against applicants to prohibit them from interfering with or impeding the functioning of respondent as a duly elected delegate.

Applicants removed this action to the United States District Court, from which it was then remanded to the state court. Applicants then brought a separate action in the District Court, alleging that the pendency of the

state court action infringed their associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. In reliance on 42 U.S.C. § 1983, they sought an injunction against further prosecution of the state court action. The District Court heard evidence and enjoined the prosecution of so much of the state court action as sought injunctive relief against the applicants, leaving the state court free to proceed with the declaratory judgment aspect of respondent's action. Respondent appealed from the order of the District Court granting injunctive relief, and the Court of Appeals then entered the order described above vacating the injunction of the District Court.

Both the state and federal court actions arise out of disputes between the parties as to what group of delegates from Illinois shall be seated at the Democratic National Convention to be held in Miami Beach, Florida, beginning July 10. Respondent contends that he and the others whom he seeks to represent were delegates elected to the convention in accordance with Illinois law at the Illinois primary election. Applicants contend that the Illinois delegate selection process does not conform to standards established by the national Democratic Party, and that, therefore, they and others associated with them, rather than respondent, should be seated by the Democratic National Convention.

Since the Court of Appeals entered its order of June 29, two additional events have supervened. On June 30, the circuit court of Cook County in which respondent's original action was pending entered a temporary restraining order enjoining applicants from "submitting or causing



to be submitted to the National Democratic Party, the Democratic National Committee or the Credentials Committee thereof, the name, or names, of any person, or persons, as prospective delegates to the 1972 Democratic National Convention" from various Illinois districts. That order also provided that "except as hereinbefore ordered" nothing in the order should prevent the applicants from "speaking on behalf of their challenge before the Credentials Committee, holding meetings or engaging in other activities commensurate with their rights of free speech and association under the First and Fourteenth Amendments to the United States Constitution." The circuit court further ordered that the matter be set for hearing on the motion of respondent for a preliminary injunction at 11 a. m. on Wednesday, July 5, in that court.

On June 30, the Credentials Committee of the Democratic National Convention voted to sustain the challenge made by applicants and others to respondent and the delegates associated with him, and to recommend to the convention that applicants and other delegates associated with them be seated by the Democratic National Convention. It is my understanding that this action on the part of the Credentials Committee is subject to review by the convention at its meeting in Miami Beach.

At the outset I am faced with a problem which, if not technically one of authority, is at the very least one of the scope of my discretion in acting on the application. The authority of a Circuit Justice to grant a stay in cases such as this stems from the provisions of 28 U.S.C. § 2101

(f), which reads in pertinent part as follows:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . ."

While this case is one in which the judgment of the Court of Appeals is undoubtedly "subject to review by the Supreme Court on writ of certiorari," as a practical matter it will become moot upon the adjournment of the Democratic National Convention, which customarily takes place in the latter part of the week in which the convention opens. On June 29, this Court adjourned until the first Monday in October, as is its annual custom. There will therefore be no possibility of this Court's convening and granting a writ of certiorari to review the judgment below unless THE CHIEF JUSTICE should determine that a Special Term of Court be convened in order to hear this case. Such Special Terms have, to my knowledge, been held only four times in the recent history of the Court: In 1942 the Court was convened to consider whether the President had authority in time of war to exclude enemy aliens from access to civilian courts, and to order them tried before military tribunals for acts of sabotage. *Ex parte Quirin*, 317 U. S. 1 (1942). A Special Term was convened in 1953 to hear the Government's motion to vacate a stay of execution of a death sentence against the Rosenbergs for espionage, after exhaustive appellate review of



their conviction. *Rosenberg* v. *United States*, 346 U. S. 273 (1953). See also *id.*, at 271. In 1958 a Special Term was held to review the Little Rock school desegregation case in time for implementation in the fall school term. *Cooper* v. *Aaron*, 358 U. S. 1 (1958).

Without in any way disparaging the importance of this case not only to the parties involved in it, but to the political processes of the country, I simply do not believe that it is the same type of case which has caused the Court to convene in Special Term on previous occasions. Both the presumptive availability of the Illinois courts to redress any deprivation of applicants' constitutional rights, which I discuss in more detail below, and the necessarily highly speculative nature of any connection between the outstanding order of the state court and the choice of a presidential candidate by the Democratic National Convention lead me to conclude that this case is not comparable to those. I therefore conclude that this is not a case in which I would be warranted in requesting THE CHIEF JUSTICE to convene a special session of this Court. See the opinion of Mr. Justice Harlan in chambers in *Travia* v. *Lomenzo*, 86 S. Ct. 7, 15 L. Ed. 2d 46 (1965).

Having so concluded, I must recognize the fact that were I to grant the stay requested by applicants, the result would be a determination on the merits of the federal litigation in their favor without any prospect of review of my action by the full membership of this Court. While I think that the provisions of 28 U.S.C. § 2101 (f) confer upon me the technical authority to grant a stay in these circumstances, I would be moved to use that authority only if I were satisfied that the judgment under review repre-

sented the most egregious departure from wholly settled principles of law established by the decisions of this Court.

The majority of the panel of the Court of Appeals, in its opinion released yesterday, relied on the principles of comity between federal and state courts as enunciated by this Court's decisions in *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Mitchum* v. *Foster*, 407 U. S. 225 (1972). While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters. See the cases cited in *Mitchum, supra,* at 243. The Court in *Mitchum,* after holding that 42 U. S. C. § 1983, under which petitioners brought this action in the District Court, was an exception to the provisions of the Anti-Injunction Act, 28 U. S. C. § 2283, went on to say:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Ibid.*

While the test to be applied may be less stringent in civil cases than in criminal, the cases cited in *Mitchum* make clear that the federal courts will not casually enjoin the conduct of pending state court proceedings of either type. Applicants make out what must be described as at least a plausible case that a portion of the decree issued by the circuit court of Cook County does abridge their associational rights guaranteed by the First and Fourteenth Amendments. But the teaching of *Younger, supra,* and *Mitchum, supra,* as I understand them, is that a plausible claim of constitutional infringement does not automatical-



ly entitle one to avail himself of the injunctive processes of the federal courts in order to prevent the conduct of pending litigation in the state courts. The opinion issued by the Court of Appeals majority specifically alluded to applicants' failure to allege that they could not adequately vindicate their constitutional claims in the Illinois state courts, and I must conclude that those courts are available to applicants for this purpose.

Mindful, therefore, of the principles of comity enjoined by our federal system, of the deference due to the judgment of the Court of Appeals (see *Breswick & Co.* v. *United States,* 75 S. Ct. 912, 100 L. Ed. 1510 (1955) (Harlan, J., in chambers)), and of the extraordinary burden which falls upon applicants when they seek a stay from a single Justice which would in effect dispose of the litigation on its merits, I conclude that they have failed to meet that burden. An order will therefore be entered denying the application for a stay of the order and mandate of the Court of Appeals.

## APPENDIX I.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT — CHANCERY DIVISION

PAUL T. WIGODA, etc,

Plaintiff,

v.

WILLIAM COUSINS, et al.,

Defendants.

No. 72 CH 2288

ORDER

This cause coming to be heard on the motion of plaintiff, Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts similarly situated, for preliminary injunction, due and proper notice being given, counsel for plaintiff and defendants being present and the Court being fully advised in the premises, and

The Court having heard oral argument and having considered the pleadings and other material filed with the Court and having heard and considered argument on the motion of defendants to dismiss the complaint without limitation to said argument, and said motion to dismiss having been denied and the defendants having rested thereon and having advised the Court that they would

make no answer to the complaint but would stand on their motion, and plaintiffs having proceeded with the evidence, and defendants' counsel having taken part in the examination and presentation of the evidence of plaintiff by objection and otherwise, and the defendants having entered into stipulation of fact on the record with plaintiff and further having offered evidence on behalf of defendants and the Court having considered the evidence of all of the parties hereto and the arguments of counsel;

The Court finds:

1. This action is brought by plaintiff pursuant to Ill. Rev. Stat. ch. 69 §§1 and 3 to enjoin defendants from interfering with the right of plaintiff and the class of challenged and uncommitted delegates and alternates to the 1972 Democratic Convention (hereinafter the "Convention") to participate in said Convention as duly elected delegates and alternates.

2. Plaintiff is a citizen and resident of the State of Illinois, is a registered voter of the 9th Congressional District in which he resides, is an attorney at law and an alderman of the City of Chicago, having been duly elected to that office by the residents of the 49th Ward in 1971. As described hereinafter, plaintiff was duly elected a delegate of the Convention in accordance with the provisions of the Illinois Election Code.

3. Plaintiff is the representative of the class of persons residing in the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois who were duly elected as "uncommitted" delegates and alternates to the Convention in accordance with the provisions



of the Illinois Election Code and fairly and adequately represents said class. The issues of fact and law herein are common to plaintiff and all other members of the class. Plaintiff and the class thus described are hereinafter collectively referred to for convenience as "the delegates".

4. The delegates are persons of white, black and Latin American extraction and include males, females and persons of all ages. The delegates are so numerous that joinder of all of them in litigation is impracticable.

5. Defendants are citizens of the State of Illinois and residents of Cook County.

6. The selection of delegates to national conventions of the political parties is duly provided for and controlled by the statutes of the State of Illinois, to-wit, §§7-14 and 14.1 of the Illinois Election Code (Ill.Rev.Stat. ch. 46, §§7-14 and 7-14.1) and other sections hereinafter cited. As stated in Section 7-1 of the Code, the election of delegates and alternates "to National nominating conventions . . . shall be made in the manner provided in this Article 7 and not otherwise."

7. On or before January 19, 1972, plaintiff and the delegates filed nominating petitions signed by at least one-half of one percent of the qualified primary electors of the Democratic Party residing in their respective Congressional districts. Said petitions were completed in accordance with the provisions of Section 7-10 of the Illinois Election Code (Ill.Rev.Stat. ch. 46, §§7-10) and filed in accordance with Section 7-12 of the Code. Defendants made no challenge to such petitions nor were such petitions nullified or stricken by the electoral boards of the City of Chicago

or the County of Cook. Plaintiff and the delegates were thereafter certified by the State Electoral Board in accordance with Section 7-14 of the Code and their names properly placed on the ballots for the primary election of March 21, 1972.

8. Thereafter, on March 21, 1972, plaintiff and the delegates were duly elected by a majority of the qualified electors of the Democratic Party voting in their respective Congressional districts in accordance with Sections 7-46 through 7-51 of the Code. The results of such elections were canvassed, certified and reported as required by Section 7-53 through 7-58 of the Code.

9. Section 7-63 of the Code provides a procedure by which the results of a primary election of a political party may be contested. The objecting party must file with the Clerk of this Court a petition in writing setting forth the grounds of contest within ten days after the completion of the canvas of the returns in such election by the canvassing board. Defendants have at no time availed themselves of the foregoing procedure or any other lawful procedure for the challenging of elections.

10. On April 18, 1972, the Secretary of State of the State of Illinois, pursuant to Section 7-58 of the Code, issued his proclamation announcing the election of the delegates.

11. Thereafter, on June 22 and June 24, 1972, those defendants listed in Schedule A hereto were selected as "alternative" delegates and alternates to the Convention in caucuses governed by certain rules of procedure established by the defendants and adopted without regard to the applicable requirements of the Illinois Election Code.



12. In contrast, plaintiff and the class he represents were elected in a free, equal, open and non-discriminatory election in which, in accord with stipulations made by defendants herein, anyone could run for office and any qualified person could vote. In said election, there were 180 candidates for 62 delegate seats.

13. No other election for delegate was conducted under the Illinois Election Code other than that election at which plaintiff and the class he represents were elected to be delegates to the Democratic National Convention.

14. On June 30, 1972, the defendants listed in Schedule A were, by resolution of the Credentials Committee of the Democratic National Convention, certified as delegates and alternates to the Convention in place of plaintiff and the other members of the class who were duly and properly elected under the Illinois Election Code.

15. Defendants established themselves solely on the basis of their own authority to select delegates from the above-mentioned Illinois Congressional Districts and without any legal justification or authority from any other people or the laws of the State of Illinois.

16. By virtue of the findings herein, the Court finds irreparable injury as follows:

(a) Plaintiff and the class he represents have been deprived of a place of authority, prestige and position to which they were entitled by virtue of the votes of the persons participating in the aforementioned primary election held pursuant to and in accord with the Illinois Election Code;

(b) The duly qualified voters who caused plaintiff and the class of persons he represents to be elected have been deprived of their right to vote and to vote effectively;

(c) The electoral process in the State of Illinois has been subverted, thwarted and nullified by the actions of defendants and persons acting in conjunction and association therewith;

(d) Plaintiff and the class of persons he represents have been deprived of their rights, obtained pursuant to a lawful election, of participating with other party functionaries in the conduct of the Democratic National Convention and from taking part in decisions to be made therein, all of which will be vital to the electorate in the State of Illinois who participated in the duly authorized election.

17. The fact that the Democratic National Convention is scheduled to convene on Monday, July 10, 1972 renders the aforesaid harm immediate and, unless defendants are herein enjoined, inevitably irreparable.

18. Each of the defendants listed in Schedule A have formally appeared before this Court and have submitted themselves to its jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from acting or purporting to act



as a delegate to the Democratic National Convention to be held commencing on July 10, 1972 from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional districts of the State of Illinois or from performing the functions of delegates from the aforesaid districts including but not limited to voting in the aforesaid Convention or in official or duly designated committees thereof.

2. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from receiving or accepting any credentials, badges or other indicia of delegate status from the officials of the aforesaid Democratic National Convention or its official or duly designated committees.

Notice of entry of this Order to counsel for the defendants shall be deemed to be notice to each of the persons on whose behalf counsel has appeared;

IT IS FURTHER ORDERED, that notice of this injunction may be served by any person designated by plaintiff or his counsel.

ENTER:

Dated: July 8, 1972

*/s/ Daniel A. Covelli*
Judge

## APPENDIX J.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

---

PAUL T. WIGODA, etc.,

Plaintiff,

v.

WILLIAM COUSINS, et al.,

Defendants.

---

No. 72 CH 2288

---

### ORDER

This cause coming on to be heard on the motion of Paul T. Wigoda, individually and on behalf of all other duly elected, challenged and uncommitted delegates and alternates to the National Democratic Convention from the 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts similarly situated (hereinafter "the delegates"), by his attorneys, Jerome T. Torshen, Ltd. and Earl L. Neal, and by the duly elected, challenged and uncommitted delegates and alternates to the 1972 Democratic National Convention from the 1st Illinois Congressional District (hereinafter also included in the description "the delegates"), for supplemental relief in clarification of the

order of this Court herein entered on July 8, 1972, and in aid of this Court's jurisdiction and to protect and effectuate the judgment of this Court herein entered on July 8, 1972, due and proper notice being given, the cause coming before the Court as a set matter, counsel for all of the parties except those hereinafter specified on Schedule B being present, and the Court being fully advised in the premises; and

The Court having provided an opportunity to defendants and each of them to respond to the motion for supplemental relief, and having considered motions to dismiss and other motions filed on behalf of the defendants and directed to the motion of plaintiff, and having considered the pleadings and other material filed with the Court and having heard whatever evidence without limitation that the parties or any of them deemed fit and proper to present to the Court, and all parties represented by counsel having taken part in the presentation of evidence and the examination of witnesses, and no answer having been filed to the said Motion for Supplemental Relief, and the Court having considered the evidence of all of the parties hereto and the arguments of counsel including the record heretofore made in this cause at the hearing of July 8, 1972, and the findings and order of the Court entered on said date;

The Court finds:

1. On August 5, 1972, a caucus of delegates and alternates to the 1972 Democratic National Convention from each of the Illinois Congressional Districts will be held.



2. On July 8, 1972, with counsel for all parties being present, after due notice and hearing and upon full consideration of the arguments and evidence of counsel for all of the parties hereto, this Court issued its injunction as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:
>
> "1. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from acting or purporting to act as a delegate to the Democratic Convention to be held commencing on July 10, 1972, from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th or 11th Congressional districts of the State of Illinois or from performing the functions of delegates from the aforesaid districts including but not limited to voting in the aforesaid Convention or in official or duly designated committees thereof.
>
> "2. That each defendant listed in Schedule A, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined and restrained from receiving or accepting any credentials, badges or other indicia of delegate status from the officials of the aforesaid Democratic National Convention or its official or duly designated committees."

3. Each of the persons named in Schedules A and B hereto, though not duly elected delegate or alternate to the Democratic National Convention, in accordance with the provisions of the Illinois Election Code, acted or purported to act as a delegate or alternate to said convention and sought to perform the functions of delegate or alter-

nate including voting on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Illinois Congressional Districts.

4. If any of the persons subject to the July 8, 1972 order of this Court named on Schedule A hereto, or if any of the persons named on Schedule B hereto, which persons stand in a position identical to those named on Schedule A insofar as they claim status as a delegate, act or purport to act as a delegate from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts at the aforesaid caucus to be held on August 5, 1972, the order of July 8, 1972, heretofore entered by this Court will be subverted, the Court's decree will, in part, be nullified, the Court's jurisdiction will be undermined and plaintiff and the class he represents will be deprived of the fruits of the litigation.

5. This Court by paragraphs 8, 10, 12 and 13 of its order of July 8, 1972, has recognized that plaintiff and the delegates and alternates he represents are the only persons who have been duly elected delegates and alternates in accordance with and pursuant to the provisions of the Illinois Election Code.

6. By virtue of the foregoing, plaintiff and the delegates and alternates are entitled to supplemental relief in clarification of the July 8, 1972 order to effectuate the said order of this Court.

7. The relief herein sought as supplemental and in clarification of the relief heretofore granted to the delegates and alternates is required in the instant circumstances, and



The Court further finds:

1. Those persons referred to herein as the delegates and alternates are the only persons elected pursuant to the Illinois Election Code as delegates and alternates to the Democratic National Convention.

2. The election at which the delegates and alternates were elected was conducted pursuant to the Illinois Election Code and the Constitution of the State of Illinois and was free and equal and open to all qualified persons as candidates and voters without limitation.

3. The process by which defendants purported to become representatives of the people of the State of Illinois was secret, restrictive, discriminatory, without foundation in law and without regard or recognition to the individual citizens of the congressional districts hereinabove mentioned who voted in the election conducted pursuant to the Illinois Election Code.

4. The fact that on August 5, 1972, a caucus of delegates and alternates from each of the Illinois Congressional Districts will be held renders additional harm to the duly elected delegates and alternates and the voters immediate and inevitably irreparable if the rights of said delegates are further interfered with.

5. Each of the defendants listed in Schedules A and B hereto is before the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Court affirms, adopts and incorporates herein by reference as if set out herein *in haec verba* its

entire order of July 8, 1972, and each and every finding set forth therein.

2. That plaintiff and the delegates and alternates whom he represents and those persons herein referred to as delegates and alternates have been duly elected to their offices by the voters of their respective congressional districts in accordance with the provisions of the Illinois Election Code; that they are the only persons elected pursuant to and in accord therewith and that plaintiff and the delegates and alternates are entitled to take their seats and to participate fully in the caucus to be held on August 5, 1972, and that said participation includes the right to vote in said caucus and in duly designated committees thereof and to take part in and perform the function of delegates or alternates in any other activities in which delegates or alternates duly elected pursuant to the statutes of the State of Illinois are entitled to take part.

3. That those persons named on Schedules A and B hereto, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined from acting or purporting to act as a delegate or alternate in said caucus to be held August 5, 1972, from or on behalf of the 1st, 2nd, 3rd, 5th, 7th, 8th, 9th and 11th Congressional Districts of the State of Illinois or from performing the function of delegate or alternate from or on behalf of the aforesaid districts thereat including but not limited to voting in the aforesaid caucus of August 5, 1972, or in any official or duly designated committee thereof;



4. That those persons named on Schedules A and B hereto, their agents, attorneys, servants, employees and other persons acting in concert with them be and the same are hereby enjoined from interfering with the taking of their seats in the caucus of August 5, 1972, by the duly elected delegates or alternates and from seeking or taking credentials at such meeting if any such credentials are needed, and are further enjoined from voting in said caucus or from taking part therein as delegates or alternates.

5. That the Court retain jurisdiction over this matter for the purpose of providing whatever further collateral, supplemental or clarifying relief as may be required in the premises.

6. That notice of entry of this order to counsel for the defendants shall be deemed to be notice to each of the persons on whose behalf counsel has appeared and that notice of this order may be served upon those persons in Schedule B who have not retained counsel by any persons designed by plaintiff or his counsel.

ENTER:

*/s/ D. A. Covelli*

Judge

## APPENDIX K.

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD
62706

November 29, 1973

Justin Taft
Clerk

Telephone
Area Code 217
525-2035

Mr. Wayne W. Whalen
Attorney at Law
231 South LaSalle St.
Chicago, Ill. 60604

No. 46227—Paul T. Wigoda, etc., respondent, vs. William Cousins, et al., petitioners. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
*/s/ Justin Taft*
Clerk of the Supreme Court